THE

LAW OF TORTS.

BY

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AND

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FOURTH EDITION,

BY

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"*Justitiæ partes sunt, non violare homines*"—CICERO.

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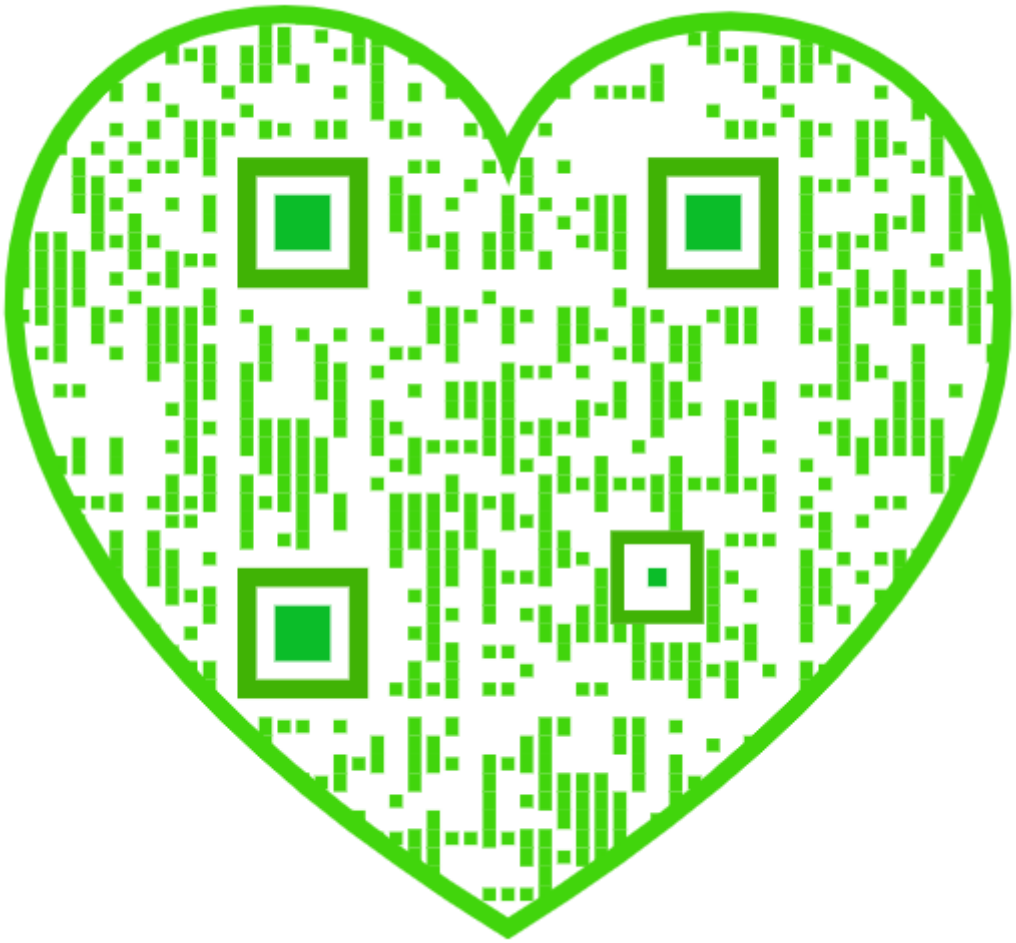

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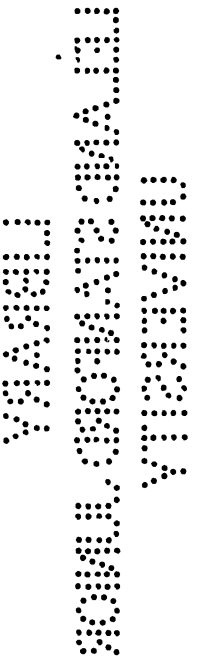

PREFACE TO THE FOURTH EDITION.

DURING the very short period which has elapsed since the issue of the Third Edition of Clerk and Lindsell on Torts a considerable number of actions dealing with the wrongful invasion of the civil rights of individuals have been adjudicated upon by the Courts. In particular, very important cases are *Scarborough* v. *Cosgrove* (*a*), relating to the liability of boarding-house keepers for negligence; *The Attorney-General and Monmouth County Council* v. *Scott* (*b*), discussing alike the duties and obligations of local authorities with regard to repairs, and of persons using the King's highway for extraordinary traffic; and *Kine* v. *Jolly* (*c*), and *Higgins* v. *Betts* (*d*), upon the *quantum* of obstruction to ancient lights which will entitle an aggrieved party to a mandatory injunction.

In the present edition the Editor has endeavoured, not only to epitomize the effect of these and very many other recent decisions, but also, by incorporating in the text a considerable number of the longer foot-notes contained in the earlier edition, generally to facilitate reference and thereby to enhance the utility of the work to the legal practitioner.

(*a*) (1905) 2 K. B. 805, C. A.

(*b*) (1904) 1 K. B. 404, C. A.; but see S. C. (1905) 2 K. B. 160, C. A. See also *Chichester Corporation* v. *Foster*, (1905) 22 T. L. R. 18; and *Hemsworth Rural Council* v. *Micklethwaite*, (1904) 2 L. G. R. 1084.

(*c*) (1905) 1 Ch. 480, C. A.

(*d*) (1905) 2 Ch. 210.

The last few sessions of Parliament have not been prolific in Legislation germane to a work on Torts; the Trade Marks Act, 1905, as consolidating and amending the law on this important subject (*a*), is, however, a much needed addition to the Statute Book, and has been dealt with at considerable length in the present volume.

The Railway Fires Act (*b*) (which comes into operation on January 1st, 1908), and is interesting as applying, to some extent, the old common law right of action to the case of persons injured by the Torts of corporations, acting in pursuance of Statutory Powers, is also discussed in the text.

The Editor desires to express his indebtedness to his friend Mr. Harold B. Barkworth, of the Inner Temple and Western Circuit, Barrister-at-Law, for valuable assistance in revision throughout the work.

WYATT PAINE.

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TEMPLE, E.C.
February, 1906.

(*a*) 5 Edw. VII. c. 15. (*b*) 5 Edw. VII. c. 11.

PREFACE TO THIRD EDITION.

PROBABLY in no branch of Law is the process of evolution, so essentially characteristic of every living system of jurisprudence when untrammelled by the fetters of codification, more conspicuous than in that which treats of civil wrongs to the individual and their appropriate remedies, in contradistinction to those felonies and misdemeanours which are punishable by the State as offences against society at large.

It is consequently small matter for surprise that during the eight years that have elapsed since the issue of the last edition of Clerk and Lindsell on Torts many considerable and important changes have taken place in that wide field of Law with which a Treatise on so extensive a subject necessarily deals.

Having regard to the varied modifications resulting from judicial decisions and legislation, and the large number of modern cases of importance, the Editor of the present edition; in his endeavour to preserve the original scope and style of the work and to eliminate none of those features which have earned for the earlier editions so worthy a place among standard legal treatises, and yet at the same time to bring the work up to date; has found it necessary somewhat to increase the size of the volume.

Something has been rewritten, much added, and, it is

believed, the whole of the subject-matter thoroughly and completely revised.

The Index, always a matter of the first importance to a practising lawyer, has been carefully collated and considerably amplified; whilst among other novel features will be found the introduction of Head Notes to each chapter, indicating the more important matters dealt with therein; a Table of Statutes; and the addition of Dates to all references to decisions alike in the Table of Cases and at the foot of each page where they originally occur.

The Editor desires to express his indebtedness to his friend Mr. Harold B. Barkworth, of the Inner Temple and Western Circuit, Barrister-at-Law, for valuable assistance in revision throughout the work.

July, 1904.

* * * * *

In compliance with a suggestion of the Publishers, this Third Edition of Clerk and Lindsell on Torts is produced as a companion volume to the Fourteenth Edition of Chitty on Contracts.

The Editors of these works, though each of them solely responsible for his own book, have had the advantage of frequently conferring with one another both on points of arrangement and difficulty.

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ERRATA.

Page 100, note (*e*), *for* "5 Ed. VII. c. 100," *read* "c. 10."
Page 129, note (*g*), *for* "5 & 6 Vict. 3 97, s. 4," *read* "c. 97, s. 4."
Page 467, end of line 15 from top, substitute a comma for period.
Page 727, note (*a*), *for* "92 L. T. 811 H. L.," *read* "511 H. L."

THE LAW OF TORTS.

CHAPTER I.

INTRODUCTORY.

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A TORT may be described as a wrong independent of contract, for which the appropriate remedy is a common law action. In order, therefore, to discover what a tort is, we must examine the various kinds of action which the law has from time to time recognised, not on any systematic theory, but according to the dictates of experience and convenience, and eliminate from the list those which are dependent on contract. What is a tort.

It is impossible to define the general term otherwise than by an enumeration of particulars (*a*). In every action there must be a plaintiff and a defendant, the former alleging a right in himself and a corresponding duty on the latter, which right has been infringed, and which duty has been broken. A cause of action of contract arises not merely where one party has broken a legally binding agreement with the other, but where two parties stand in such a mutual relation that a sum of money is legally due from the one to the other, in which case the law is said to imply

(*a*) Formerly an injured husband could sue the seducer of his wife in an action of criminal conversation. The seduction, therefore, was a tort. As the law now stands, the husband's remedy is by a petition in the divorce court (20 & 21 Vict. c. 85, ss. 33, 59). The alteration is merely in procedure, for the same redress is given as before and on the same principles. Yet it would seem that as the essential character of a tort is the form of remedy, the change must be considered as taking the seduction of a married woman out of the class of torts.

a contract to pay the money. Where a statute imposes a penalty on one man in favour of another, the penalty is recoverable usually in an action of debt, which in form is an action of contract. But where there is a breach of duty imposed by the law apart from any consent of the person owing the duty, and the remedy claimed is not the payment of a definite sum of money but pecuniary compensation for the injury, then we have a wrong independent of contract which gives rise to an action of tort (*a*).

Independent of contract.

The expression "independent of contract" is one that requires explanation, for there may be a tort which arises out of a breach of contract and yet is independent of it. At a time when the forms of action were strictly distinguished in pleading, it was often allowable to declare in tort on a breach of duty which arose simply in consequence of the agreement of the parties. Thus, if a banker improperly dishonoured a customer's cheque, he might be sued in tort (*b*). So if a bailee by some careless act damages goods entrusted to him, he probably commits a breach of the express or implied contract of bailment, but he is also guilty of a tort, for everyone is bound to take care that he does not damage the property of another (*c*). As between the parties to the contract themselves the fact of the existence of this double remedy is immaterial, for the law looks at the substance of the thing, and does not permit the form of action to alter rights which are defined beforehand by the consent of those immediately concerned (*d*); but as regards the rights of third parties an act is none the less a tort because it is also a breach of contract. If a father employs a medical man to attend on his son, and the latter is injured by unskilful treatment, the father has a remedy for the breach of the contract, but the son has also a remedy for the tort (*e*). "Suppose A. lets B. a horse, B. with C.'s licence

(*a*) The statutory remedy of an action against the police authority of a district in respect of property damaged in riots, which has been substituted for the old action against the hundredors (49 & 50 Vict. c. 38), stands outside this classification altogether.

(*b*) *Marzetti* v. *Williams*, (1830) 1 B. & Ad. 415.

(*c*) *Hayn* v. *Culliford*, (1879) 4 C. P. D. 182. An action founded on the common law liability of a bailee is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888 (*Turner* v. *Stallibrass*, (1898) 1 Q. B. 56, C. A.).

(*d*) *Marzetti* v. *Williams*, *supra*.

(*e*) *Gladwell* v. *Steggall*, (1839) 5 Bing. N. C. 733.

puts up at C.'s stables for reward to C. from B., C. turns into the stables loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured (*a*). So if he gave the horse bad oats which injured the horse he would be liable" (*b*). So if A. in breach of contract supplies to B. a chattel dangerous by reason of a latent defect, and B. using it in the way contemplated by the parties, entrusts it to C., who thereby suffers damage, C. has an action of tort against A. (*c*).

In all these cases the injury arises out of a breach of contract; the injured party has to show how the duty arose towards him by proving the contract as one of the facts of the case, but the wrong is independent of contract because the defendant has not contracted with the plaintiff to perform any duty; the law has imposed it upon him.

There is another kind of case which, although the cause of action involves a breach of contract, is yet independent of contract, inasmuch as there is no contract between the parties. If A. knowing that B. has made a contract with C. maliciously induces B. to break that contract, and C. is thereby damnified, the latter can not only sue B. for his breach of contract, but has also an action of tort against A. for procuring that breach (*d*).

What invasions of right constitute a tort.

Although, as has been already pointed out, it is impossible to lay down any general principle to which all actions of tort may be referred, it will be found that they are in the main directed to afford the simple remedy of pecuniary satisfaction for direct and obvious invasions of the three elementary rights of civilised society—the right of personal liberty and security, the right of reputation, and the right of property.

Rights of property.

Under this last head must be included not merely those various

(*a*) Although B. would also have a right of action against C. (*The Winkfield*, (1902) P. 42); see also *The Millwall*, (1905) 91 L. T. 695.

(*b*) *Per* Bramwell, L.J., *Hayn* v. *Culliford*, (1879) 4 C. P. D. p. 185.

(*c*) *George* v. *Skivington*, (1869) L. R. 5 Ex. 1; *Elliot* v. *Hall*, (1885) 15 Q. B. D. 315.

(*d*) *Quinn* v. *Leathem*, (1901) A. C. 495; *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, (1901) A. C. 426; *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, (1903) 1 K. B. 118 and 2 K. B. 545; affirmed *sub nom.* *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, (1905) A. C. 239; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, (1903) 2 K. B. 600, C. A.; *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333.

rights and interests, corporeal and incorporeal, with their respective incidents, which are capable of transfer from one to another, and which in ordinary language are intended when the term property is used, but also all those collateral rights of a personal nature by means of which men are enabled to acquire, enjoy and preserve their property. "Private property," it has been said, "is either property in possession, property in action, or property that an individual has a special right to acquire. . . . A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it" (*a*). In other words, the right to earn a living by all lawful means may in a certain limited sense be said to be a right of property.

Domestic rights, in so far as they are recognised in the law of torts, may be classified as rights of property. A father has a right to the service of his child up to the age of twenty-one years, and for the loss of that service he may have his action (*b*); but a

(*a*) *Per Cur.*, *Hannam* v. *Mockett*, (1824) 2 B. & C. p. 937.

(*b*) This right of the father to the custody (*In re Agar Ellis*, (1883) 24 Ch. D. 317) and to the services (*Dean* v. *Peel*, (1804) 5 East, 45) of his child exists up to the age of twenty-one. But the extent to which that right can be enforced has been considerably modified in modern times. From the point of view of the early common law the *status* of a child was one of qualified servitude; it was regarded as the chattel of the father. In course of time, however, even the Courts of Common Law came to limit the parent's rights to this extent, that after the child had arrived at a certain age—fourteen in the case of boys (*In re Shanahan*, (1852) 20 L. T. 183), sixteen in that of girls (*Reg.* v. *Howes*, (1860) 3 E. & E. 332)—they refused to assist the father to regain possession of the child for the purpose of enforcing his rights, even though no misconduct on the father's part were proved; and they also refused to allow a father to apprentice his child to another person without the child's consent (*R.* v. *Arnesby*, (1820) 3 B. & A. 584, dissenting from the earlier authority of *Com. Dig.* tit. *Justices of the Peace*, B. 55). But though the Courts of Common Law would not assist the parent in enforcing his rights against his child after the ages of fourteen or sixteen as the case might be, they apparently allowed him to take the law into his own hands and to maintain his rights by force (see below, p. 215), and they also allowed him to recover damages for any interference with his rights by a third person, by injuring, debauching, or enticing away the child, up to the age of twenty-one. On the other hand, the Court of Chancery looked at the question of the custody of the child from the point of view, not of the father's rights, but of his duties. It considered only the welfare of the child, and claimed under the authority delegated to it by the Crown, as the supreme *parens patriæ*, to control and, if necessary, to supersede the natural right of the parent (*per* Lord Cottenham, *In re Spence*, (1847) 2 Ph. 247). The Court had an absolute discretion to regulate the custody of the child up to the age of twenty-one; but in the absence of misconduct on the part of the parent, or of facts showing that it was obviously for the benefit of the child that it should live elsewhere it would only exercise

child by the common law has no corresponding remedy for the loss of the protection and support of his father, insomuch as he has nothing therein in the nature of a right of property. By statute (*a*), however, he may recover compensation for the pecuniary loss caused by an act wrongful in itself, and resulting in the death of his father. It is, to say the least, very doubtful, however, whether, except under the statute above referred to, a wife can recover for the loss of the *consortium* of her husband (*b*). But a husband may sue for the loss of his wife's service; and although he can no longer compel his wife to live with him by taking forcible possession of her person (*c*), it is apprehended that his right to the *consortium* and services of his wife must still be regarded as a valid and subsisting right available as

its discretion in one way, that of giving the custody to the father. For *primâ facie* the Court, "whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children" (*per* Bacon, V.-C., *In re Plomley*, (1882) 47 L. T. N. S. p. 284), it being *primâ facie* of the greatest benefit to the child to be with its father (*per* Kindersley, V.-C., *In re Curtis*, (1859) 28 L. J. Ch. 458; *per* Lindley, L.J., *In re McGrath*, (1893) 1 Ch. 143). In the exercise of this discretion, the Court of Chancery did not, like the Courts of Common Law, refuse to restore a child to its father after the age of fourteen or sixteen (*Todd* v. *Lynes*, Times, 26 July, 1873).

Now by s. 25. subsec. 10, of the Judicature Act, in questions relating to the custody of infants, the rules of equity prevail. The net result of the common law, as modified by that provision, may be expressed in the following propositions: —

1. A father has, in the absence of misconduct on his part, and until interference by the Court, a right to the custody and services of his children of either sex unmarried up to the age of twenty-one, for infringements of which right he has as against third persons a remedy in damages: and for the purpose of enforcing it as against the child he probably may keep or retake possession of his child's person by force.

2. He probably loses those rights by misconduct, even without the intervention of the Court (see below, pp. 215–217).

3. The Court, upon its aid being invoked to recover possession of the child, has an absolute discretion to dispose of the child's custody, even though there be no misconduct on the part of the parent. But, except in extreme cases, it will always consider it to be to the best interests of the child to be with its father.

4. That discretion the Court will exercise so long as the child is under twenty-one. The old common law distinction between children under the ages of fourteen or sixteen and children over those ages, must be regarded as obsolete. (It is submitted that the dicta of Lord Esher, M.R., and Smith, L.J., in *Reg.* v. *Gyngall*, (1893) 2 Q. B. at pp. 245, 253, to the contrary, are not law. It will be observed on reference to that case, that Kay, L.J., did not express any assent to their proposition.)

(*a*) 9 & 10 Vict. c. 93; and see 60 & 61 Vict. c. 37.

(*b*) In *Lynch* v. *Knight*, (1861) 9 H. L. C. 577, Lord Wensleydale expressly held that she could not. The other law lords expressed opinions in the contrary sense, but their judgments did not turn on this point, see below, p. 228.

(*c*) *Reg.* v. *Jackson*, (1891) 1 Q. B. 671.

against third persons, and that the case of *Winsmore* v. *Greenbank* (*a*), where an action was held to lie for persuading a wife to continue absent from her husband, is still good law (*b*).

The decision in *Ashby* v. *White* (*c*), that the malicious refusal of a returning officer to accept the vote of a duly qualified elector was a tort as well as a breach of public duty, probably rested on the notion that the political franchise, like other franchises, was to be regarded as a right of property. It is, perhaps, doubtful whether at the present date such a principle would, apart from authority, find acceptance.

Conflict of rights.

It is obvious that unless the rights of individuals are modified and limited they must be frequently in conflict one with another. No man can always do as he pleases, except by preventing other people doing as they please. "The due regulation and subordination of conflicting rights constitute the chief part of the science of law. It is impossible to give any rule applicable to all cases which may arise, except the general one that whenever damage is caused to one man by another the law, in deciding which shall bear the loss, is governed by principles of expediency, modified by public sentiment" (*d*).

How adjusted.

In many cases where there is a conflict of interests the law does not interfere, but leaves each individual to do the best he can for himself. If one landowner has a well, and his neighbour digs a well in the adjoining close, which drains away the percolating water and leaves the first well dry, the owner cannot complain, for his neighbour has as good a right as he to the subterranean flow. His remedy is to dig deeper (*e*). So, a landowner may ward off a sudden flood, although the effect be to throw the water on to another man's land (*f*). Sometimes a right or license (*g*) is given subject to the condition that it be used with care. Thus the highway is open to all, but every passenger is bound to do his best not to impede or injure other passengers (*h*). Sometimes

(*a*) (1745) Willes, 577.

(*b*) And see *Smith* v. *Kaye and Another*, (1904) 20 T. L. R. 261.

(*c*) (1703) Lord Raym. 938. An action will not lie against a Member of Parliament for refusing to present a petition to Parliament (*Chaffers* v. *Goldsmid*, (1894) 1 Q. B. 186).

(*d*) Addison on Torts, 8th ed. p. 17.

(*e*) *Chasemore* v. *Richards*, (1859) 7 H. L. C. 349.

(*f*) *Nield* v. *London & North Western R. Co.*, (1874) L. R. 10 Ex. 4.

(*g*) *Gibbings* v. *Hungerford*, (1904) 1 Ir. R. 211, C. A.

(*h*) Where, however, the tendency of

the only limitation to a right is that it must be exercised in good faith. Sometimes, again, the law subordinates the one right to the other. Thus, a landowner has a right to dig and carry away his own soil, but if in so doing he lets down the soil of his neighbour he is answerable; for the right of the latter to have his soil supported is the better right of the two.

Right implies corresponding duty.

Where a right exists there must be a corresponding duty to observe that right, and a tort may be spoken of either as a breach of duty or an infringement of a right. It is convenient to use the latter expression where the act is wrongful in itself apart from its consequences, for then its injurious character is best ascertained by an accurate definition of the right of the party aggrieved. But where an injury is consequential only it is more convenient to consider the nature of the duty. If a defendant has been guilty of negligence it makes no difference in the character of his liability whether he injured the person or the goods or the land of the plaintiff.

Three classes of torts.

Torts may be divided into three classes: first, those in which a party is liable simply because he has done or omitted to do something, which of itself amounts to an infringement of right or a breach of duty; secondly, those in which the conduct of the wrong-doer has been unlawful only by reason of his failure to exercise proper care and skill; thirdly, those in which there must be an element of moral misconduct.

Acts wrongful in themselves. Trespass.

1. A trespass, that is to say, a direct physical interference with the person, land, or goods of another, is as a rule actionable in itself, however innocent the conduct of the wrong-doer may be. If A. walk over B.'s field without permission, he may have no knowledge of the owner's right nor intention to injure him; he may reasonably believe that he is using a public footpath; but his good faith and absence of negligence, although they may be very material in considering the damages that shall be awarded against him, do not alter the fact that he has been guilty of a legal wrong (*a*). The only question is whether the very act which constitutes the trespass is his act. That is a man's act

Wilful trespass.

a particular class of users of the highway is to subordinate the rights of the general public to their own selfish interests, the law will impose certain restrictions upon them (the Motor Car Act, 1903).

(*a*) *Basely* v. *Clarkson*, (1682) 3 Lev. 37.

which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice. Therefore where the defendant had formed one of a party who committed a trespass, it was held no answer to plead that his co-trespassers had compelled him by menaces to accompany them (*a*). So it will seem that if a man finding himself in the neighbourhood of a dangerous animal goes where he has no right, in order to secure his safety, he is a trespasser; but if being pursued, in the blindness of fear, he takes refuge in the same place, then since he exercises no choice he cannot be considered a voluntary agent and commits no wrong. This proposition would seem to be involved in the well-known American decision (*b*), where it was held that the defendant was liable in trespass, because a boy whom he had pursued with uplifted weapon rushed headlong into a shop and did damage there, for if the boy were a trespasser, other than in relation, his entry could not well be the act of the defendant. If A. driving along the high road and seeking to avoid a collision with B. comes into contact with C., he may be liable to C. if he be negligent, but not otherwise. But if in order to avoid B., he directs his vehicle against C., making as it were a choice of evils, this of itself constitutes a good cause of action, because he has chosen to do the very thing which infringes C.'s right (*c*). And, *primâ facie*, there is evidence of negligence, on the part of the owner, if, in broad daylight, a runaway horse and cart cause injury in a public street (*d*).

Negligent trespass.

It is to be observed that under the form of the action of trespass were included wrongs essentially diverse in their nature. If a man aims at another with his gun and wounds him, here the wounding is the very thing which he intends; but if he fires carelessly and hits a passer-by, in this case the wound cannot be said to be his act, that is to say, the thing which he chooses to do; it is rather the consequence of his act (*e*). In both cases

(*a*) *Gilbert* v. *Stone*, (1647) Aleyn, 35.

(*b*) *Vandenburgh* v. *Truax*, (1847) 4 Denio, 464.

(*c*) *Holmes* v. *Mather*, (1875) L. R. 10 Ex. 261. As to the liability of infants of tender years, and lunatics for their trespasses, see below, pp. 46–48.

(*d*) *Snee* v. *Durkie*, (1903) 6 F. 42, Ct. of Sess.

(*e*) As to responsibility when the immediate cause of the accident is the act of a third party, see *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A. In the old authorities trespass seems to have

alike, however, it was said that there was a wrong done by direct physical force, therefore a trespass; and as the form of action was the same, it has been sometimes supposed that the principles of liability are also the same, and that a party may be liable without more for the unforeseen consequences of his act, provided they are sufficiently direct. Observations to that effect may be found in the reports, but little authority. Thus it is said, "If a man assault me, and I lift up my staff to defend myself, and in lifting it hit another, an action lies by that person, and yet I did a lawful thing" (*a*). In *Leame* v. *Bray* (*b*) Grose, J., says, "Looking into all the cases from the Year-Book in 21 Hen. VII. down to the latest decision on the subject, I find the principle to be that if the injury be done by the act of the party himself at the time or he be the immediate cause of it though it happen accidentally or by misfortune, yet he is answerable in trespass." The authority referred to in the Year-Book simply amounts to this, that he who shoots and wounds another unintentionally may be liable in trespass, though he commits no felony (*c*). However, in spite of the

been allowed as a form of action, where the injury was clearly consequential, and was in fact averred with a *per quod*. Thus in *Fitzherbert*, N. B. p. 89, it is said if a man fill a ditch with mud and earth by which another man's land is overflowed he shall have a writ of trespass, "wherewith force and arms he filled a certain ditch . . . *inasmuch* that the water being hindered of its ancient course overflowed, &c." See, too, *Preston* v. *Mercer*, (1656) Hardres, 60; *Courtney* v. *Collett*, (1698) Lord Raym. 273. In the more recent case of *Gregory* v. *Piper*, (1829) 9 B. & C. 591, trespass was maintained, where only in a highly artificial sense could it be said that force was directly applied.

(*a*) *Bessey* v. *Olliet*, (1683) T. Raym. p. 468.

(*b*) (1803) 3 East, p. 600.

(*c*) In another case from the Year-Books (6 Ed. IV. 7, pl. 18) it was said to be a trespass where a man was cutting his hedge and the thorns *se invito* fell on his neighbour's land; but here there was clearly negligence. In *Weaver* v. *Ward*, (1616) Hob. 134, the defendant had wounded the plaintiff by a shot and pleaded that it was done *casualiter et per infortunium et contra voluntatem suam*, and the plea was adjudged ill because he ought to have set out the facts specially so that it might appear whether he had been negligent or not. This case appears an authority for the proposition that where the plaintiff proves a *primâ facie* case of trespass, the burden of proof is on the defendant to negative both intention and negligence. In *Dickenson* v. *Watson*, (1682) T. Jones, 205, and *Underwood* v. *Hewson*, (1724) Stra. 596, which were cases of trespass by gunshot wounds, there was, as far as can be gathered from the meagre reports, evidence of negligence. In *Stanley* v. *Powell*, (1891) 1 Q. B. 86, where the defendant whilst firing at a pheasant accidentally and without negligence wounded the plaintiff with a pellet from his gun, it was held that no action lay. And see the discussion on this subject in Holmes on the Common Law, pp. 87 *sqq*.

scantiness of direct authority, the law may be thus summed up (*a*) :—"As to the cases cited, most of them are really decisions on the form of action whether case or trespass. The result of them is this, and it is intelligible enough; if the act that does an injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful (*b*), or the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful."

The unauthorised taking of a chattel not always a trespass.

If one man takes the chattel of another without authority, *primâ facie* it is a trespass, but this is not a universally true proposition. "The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner" (*c*). So a stranger may in the absence of the executor do what is immediately necessary for the preservation of the goods of a deceased person (*d*). In these cases, therefore, the question of trespass depends not upon the act, but upon the motive. If the finder deals with the goods with the object of benefiting the owner, he does not commit a trespass, but if not,

Conversion of chattel.

he does. If a man not merely takes the chattel of another, but also makes use of it in a manner inconsistent with the title of the real owner, he is guilty not merely of a trespass but of a conversion (*e*), and generally is liable for the total value of the article. Where an act is ambiguous in its nature, it must depend upon the motive of the doer whether it is a trespass or a conversion (*f*), and the motive again may depend upon his knowledge of the title of the true owner (*g*).

Straying cattle.

Although it is customary to speak of an injury done by straying cattle as a trespass, and trespass in such a case was

(*a*) *Per* Bramwell, B., *Holmes* v. *Mather*, (1875) L. R. 10 Ex. p. 268.

(*b*) "Wilful" here clearly means not that it was intended to commit a trespass, but that it was intended to do the very thing which constitutes a trespass.

(*c*) *Per* Blackburn, J., *Fowler* v. *Hollins*, (1872) L. R. 7 H. L. p. 766. As to what taking constitutes a trespass, see below, pp. 231–232.

(*d*) *Kirk* v. *Gregory*, (1876) 1 Ex. D. 55.

(*e*) See below, pp. 234–236.

(*f*) *Fouldes* v. *Willoughby*, (1841) 8 M. & W. 540.

(*g*) See *per* Blackburn, J., *Fowler* v. *Hollins*, (1872) L. R. 7 H. L. pp. 766–7. As to the question of title by mere possession, see *South Staffordshire Water Co.* v. *Sharman*, (1896) 2 Q. B. 44.

formerly the appropriate form of action, yet the liability does not rest on the mere invasion of right but on the breach of duty. While a man's cattle are on his own land he is bound to insure that they do not stray (*a*); while they are passing on the high road he is only bound to take care that they do not stray (*b*).

Injuries to servants.

A trespass to the person of a servant which has the effect of depriving the master of his service is of itself an injury to the master, who is considered to have a property in the person of the servant. Hence, for an assault on the servant he could sue in trespass, though an allegation of *per quod servitium amisit* was also necessary, and the real gist of the action was the consequential injury. But apart from this historical anomaly, an interference with rights of service or rights of contract generally is not actionable unless malicious (*c*).

Injuries to incorporeal rights.

An act which amounts to a direct invasion of a definite incorporeal right of property is of itself a tort, just as trespass is in the case of corporeal property. In an action for the disturbance of an easement the sole questions are whether the plaintiff has the right he claims, and whether it has been in fact disturbed by what the defendant has done. So with regard to personal property: a copyright or a patent right confers a monopoly in the sale of a certain article. If the monopoly is infringed the possessor of the right has his action, however innocent the infringement may be. It has been said that a right in a trade mark or trade name is a right of property which will be protected in the same manner as a patent right. This is, however, apparently not absolutely certain (*d*) although the trend of recent legislation and notably of the Trade Marks Act, 1905, is to affirm the existence of such a right. At common law the ground of action for the infringement of a trade mark or name has always been said to be that the defendant has defrauded the plaintiff by palming off his own goods on the public as those of

(*a*) *Lee* v. *Riley*, (1865) 18 C. B. N. S. 722.

(*b*) *Tillet* v. *Ward*, (1882) 10 Q. B. D. 17.

(*c*) *Cattle* v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453. The mere fact of interference, however, may raise a presumption of malice. *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, (1903) 2 K. B. 545; affirmed by House of Lords *sub nom. South Wales Miners' Federation* v. *Glamorgan Coal Co.*, (1905) A. C. 239.

(*d*) See the question discussed, *Singer Machine Manufacturers* v. *Wilson*, (1876) 3 App. Cas. 376. See Ch. XXI.

the plaintiff. Since, however, trade marks are now regulated by statute and registered, there may be some ground for regarding them as property in the strict sense.

Absolute duties.

There are many duties which, subject to the exception of the act of God (*a*) and the King's enemies, are unqualified in their nature. Among the most important are those which arise out of the use and enjoyment of land. Here, subject to certain natural rights (*b*) of mining, quarrying, and cultivation, the maxim *sic utere tuo ut alienum non lædas* applies. Nothing must be done on the land to damage those outside it. Whatever the owner brings there he must keep in at his peril (*c*). A riparian proprietor may not bank his land against the flooding of a stream if the effect is to send more water on to his neighbour's (*d*); although where the sea encroaches or there is an inundation of land water, this is a common danger against which everybody may guard without regard to the effect on other proprietors (*e*). If water is on a man's land which he did not bring there, he is not bound to keep it in, but he may not artificially send it away (*f*).

The duty of the occupant of land to keep cattle from straying is unqualified (*g*). So also is the duty to keep animals *feræ naturæ*, or of known vice, from doing harm in accordance with their propensities (*h*). So, if a man light or maintain a fire he must see that it does not send out sparks, or otherwise spread and set light to the property of others (*i*).

Statutory authority.

Where, however, an express statutory authority is given to make a certain use of property or to do a certain class of acts, such acts or such user, apart from specific legislation, cannot

(*a*) For the explanation of this expression, see Ch. XV.

(*b*) As to distinction between natural and non-natural user, see Ch. XV.

(*c*) See Ch. XV.

(*d*) *Menzies* v. *Breadalbane*, (1828) 3 Bli. N. R. 414. See below, p. 157.

(*e*) *Nield* v. *London & North Western R. Co.*, (1874) L. R. 10 Ex. 4; *Rex* v. *Pagham Commissioners*, (1828) 8 B. & C. 355. But it is unlawful for the owner of land to remove a natural bulwark against the sea, and he may be liable for the damage so caused, not on the ground that it is a breach of private duty but because it is a breach of public duty causing particular damage (*Attorney-General* v. *Tomline*, (1879–80) 12 Ch. D. 214; 14 Ch. D. 58).

(*f*) *Whalley* v. *Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. 131.

(*g*) *Lee* v. *Riley*, (1865) 18 C. B. N. S. 722.

(*h*) *May* v. *Burdett*, (1846) 9 Q. B. 101; *Filburn* v. *People's Palace and Aquarium Co.*, (1890) 25 Q. B. D. 258.

(*i*) *Filliter* v. *Phippard*, (1847) 11 Q. B. 347.

of themselves constitute a wrong (*a*). The duty ceases to be unqualified, but there still remains a duty to act with proper care and skill. Thus, if a railway company use engines under statutory authority, and in spite of all precautions sparks escape and cause damage, no action lies (*b*).

It is, however, provided by the Railway Fires Act, 1905 (*c*), that "when . . . damage" (not exceeding one hundred pounds) "is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage."

Statutory authority is, moreover, no defence to an action based on negligence. Where, however, the negligent tort-feasor is a "public authority," the action must be brought within the period limited by statute, or it is altogether barred (*d*).

Negligence—ambiguous signification.

2. The word negligence is used in law in a double sense, which may be a source of fallacy. It is sometimes used to express a breach of duty unqualified in its nature, as where we speak of the negligent keeping of fire, the negligent storage of water, or the negligent keeping of a dangerous animal. In these cases the conduct of the defendant may have been perfectly reasonable and careful throughout, and yet he may be liable. But when we speak of negligent driving along a highway, or the negligent use of a gun, we indicate a very different source of liability, arising not from the nature of the thing done, but from the want of proper care and forethought in the doing of it. It is in the latter sense that it is proposed to use the word negligence in the present work (*e*). "Negligence is an omission to do something

Definition.

(*a*) *London, Brighton & South Coast R. Co.* v. *Truman*, (1885) 11 App. Cas. 45. Cp. *Met. Asylum Dis.* v. *Hill*, (1881) 6 App. Cas. 193.

(*b*) *Vaughan* v. *Taff Vale R. Co.*, (1860) 5 H. & N. 679; *Jones* v. *Festiniog R. Co.*, (1868) L. R. 3 Q. B. 733. Cp. *Powell* v. *Fall*, (1880) 5 Q. B. D. 597.

(*c*) 5 Ed. VII. c. 11. (THIS ACT COMES INTO OPERATION ON JANUARY 1ST, 1908.)

(*d*) 56 & 57 Vict. c. 61, and see *Williams* v. *Mersey Docks and Harbour Board*, (1905) 1 K. B. 804, C. A.

(*e*) There is another fallacy lurking in the use of the word negligence. A mine-owner is not bound in working his mine to take care not to damage his neighbour. If his operations are reasonable and proper in his own interest he is not obliged to take precautions against the natural consequence. It is sometimes, however, said that he is liable if he mines negligently. But negligence

which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do" (*a*). A mere omission, however, except where some duty of a public nature is imposed by the law, or where the functions of some office have to be discharged, is not actionable. It is not legal negligence to refuse to throw a rope to a drowning man, or to omit to warn a person of an approaching vehicle. An omission is only negligent when coupled with a precedent act out of which a responsibility arises. The reasonableness of any conduct must be considered with reference to the probability not only of its causing damage to others at all, but further of causing damage in a particular way and to a particular person.

Negligence of omission.

Damage must be proximate.

It is not enough to show a negligent act and damage following. The damage must not be too remote; it must not happen in a way that could not reasonably have been anticipated, and it must happen to a person whom the wrong-doer might reasonably have contemplated as likely to be affected by his conduct (*b*). As the essence of negligence is a lack of reasonableness, it would seem that it can never be imputed to those who in consequence of their tender years or natural imbecility cannot be said to possess reasoning powers (*c*). This latter proposition must, however, be taken with the qualification that although a person of unsound mind is undoubtedly irresponsible for a tortious act, arising immediately out of, or actually covered by, the mental derangement from which he suffers, it is quite conceivable, nay probable, that a plea of monomania would be no defence to an action against him, when the act complained of could be shown to the satisfaction of the Court to have arisen under circumstances evidencing, on the part of the wrong-doer, a normal appreciation of the necessary consequences of his illegal act.

Negligence of infants and imbeciles.

Negligence depends on general view of circumstances.

In all other cases it is assumed that the party in question possesses average common sense and the ordinary experience of life. But, though no one is excused for not knowing what every

here means omission to mine properly, not omission to take care of his neighbour. See Ch. XV.

(*a*) *Per* Alderson, B., *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. p. 784.

(*b*) See Ch. XV.

(*c*) *Lay* v. *Midland R. Co.*, (1874–5) 34 L. T. N. S. 30. See below, pp. 46–48.

one ought to know, special knowledge may clearly be a ground of liability. If A. knows a gun to be unsafe and B. does not, it may be very reasonable for B. to deal with it in a manner which on the part of A. would be highly negligent. Reasonableness must have reference to all the surrounding circumstances, and A.'s knowledge is one of those circumstances.

Negligent user of land.

With regard to the use of land, questions of negligence as a rule do not arise between those using the land and those outside it. As between persons so situated the reciprocal rights and duties are usually absolute. A duty to take *some* care exists towards all who come lawfully on the land, whether as guests, servants, bare licensees, or in virtue of some right or interest. The respective duties towards these different classes are elsewhere fully pointed out (*a*). Apart from the user of land, every act or omission which is in itself negligent, and is a sufficiently proximate cause of damage to the person or corporeal property of another, affords a cause of action (*b*). But towards a trespasser there is no duty to take care that either the land or the chattel in respect of which the trespass is committed is in a safe condition (*c*). The duty is not to prepare danger with intent to injure, except for the purpose of reasonable self-protection, and not to do that which the law expressly forbids (*d*). But, as will be seen, it is no defence, when a man has by a negligent act of commission done damage to another, to say that the party damaged was a trespasser (*e*).

Negligent misrepresentation.

In some cases of negligence the immediate cause of the damage complained of is the plaintiff's own act, as for instance, where the defendant negligently puts into his hands a dangerous thing, and he, using it in the way contemplated, is damaged in his person or property. In such a case it is obvious that if he knew of the danger, he is the author of his own wrong; and has suffered not by reason of anything which the defendant did, but by reason of what he did himself. *Volenti non fit injuria* (*f*). In order

(*a*) See Ch. XV.

(*b*) *Hayn* v. *Culliford*, (1879) 4 C. P. D. 182. As to the defence of contributory negligence, see Ch. XV.

(*c*) *Mangan* v. *Atterton*, (1866) L. R. 1 Ex. 240; *Blyth* v. *Topham*, (1607) Cro. Jac. 158.

(*d*) *Bird* v. *Holbrook*, (1828) 4 Bing. 628. See below, pp. 155–156. *Barnes* v. *Ward*, (1850) 9 C. B. 392.

(*e*) *Davies* v. *Mann*, (1842) 10 M. & W. 546. See Ch. XV.

(*f*) For the limitations of the maxim, see below, Ch. XV.

therefore to establish a cause of action, he must show that he was in ignorance of the risk, and that for such ignorance the defendant was responsible by reason of representations expressly or impliedly made that the thing might be safely used. The cause of action, therefore, is for a misrepresentation, not necessarily wilfully, but negligently made. So the liability of the possessor of land to those coming upon it by his invitation may be said to depend ultimately upon an implied representation. As a general rule, however, a negligent misrepresentation, although acted upon to the damage of the person to whom it was made, is not ground of action. Though the question was at one time regarded as doubtful, it is now finally settled that in general a misrepresentation is not actionable against the person making it unless it be fraudulent (*a*); and to this general rule the only exception which the law makes is where the injury suffered by the plaintiff in consequence of the misrepresentation is, as in the cases above referred to, a physical injury (*b*), although on the other hand an innocent misrepresentation may go so much to the root of the matter as to avoid a right which would otherwise accrue to the person making it (*c*).

Moral misconduct.

8. In certain cases the wrongfulness of an act is made to depend upon the existence of an element of moral misconduct. Such moral misconduct may consist either (a) in doing the act from an improper motive, or (b) in the use of improper means to gain the end which the defendant has in view.

Malice.

(a) The technical name usually given to the various motives which the law does not allow is "malice," under which term are included many motives besides that of spite, or a desire to injure the plaintiff. What particular motives the law will consider improper and malicious will vary according to the circumstances. Under some circumstances it will consider a particular motive, such as that of a desire to benefit oneself at another person's expense, as a wrong motive, while under other circumstances it will regard the same motive as innocent (*d*).

(*a*) See below, Ch. XVI.

(*b*) See below, Ch. XVI.

(*c*) *Seddon* v. *The North-Eastern Salt Co., Ltd.*, (1905) 1 Ch. 326. *Life and Health Insurance Co.* v. *Yule*, (1904) 6 F. 437, Ct. of Sess.

(*d*) Compare the case of *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333, with *Mogul*

In cases in which the respective rights of the plaintiff and defendant conflict, the law will in some cases allow the defendant's right to prevail unconditionally, in others it will only allow him to exercise his right to the plaintiff's detriment subject to the condition of his so exercising it for a particular purpose. In the latter cases, if the defendant acts from any motive other than that of fulfilling the purpose for which the privilege was given him, the law will hold his conduct to be malicious and actionable. The most familiar example of a right given for a special purpose is that of publishing defamatory matter upon a privileged occasion. If A. publishes to C. matter defamatory of B., his act is *primâ facie* wrongful. If he does so for the purpose of giving C. some information which it is right that C. should have, he is privileged; but if his communication is made not really for the purpose of giving information to C. but from some side motive, he is not acting under the privilege, and his conduct is actionable. Again, if one man sets the criminal law in motion against another, he is protected against the consequences of so doing, even though he acted without sufficient cause, if his motive was to forward the ends of justice. So, it is a good plea in actions of slander of title, and other actions of the like nature, that the defendant was seeking to protect some interest of his own.

Malice in case of conflicting rights.

Another class of cases in which the existence of a wrong motive is an ingredient of liability, consists of cases in which one person persuades another to commit a breach of his contract with a third. In *Bowen* v. *Hall* (*a*), the defendant induced another person to break his contract of exclusive personal service with the plaintiff in order that he might enter the service of the defendant. The latter's conduct was held to be actionable upon the ground that it was done with an improper motive, that of benefiting himself at the expense of the plaintiff. It was there conceded by the Court that "merely to persuade a person to break his contract" without any such improper motive would not be actionable.

Malicious procurement of breach of contract.

As a general rule, however, the law regards the thing done and not the reason why it was done. Thus in the recent case of

Steamship Co. v. *McGregor & Co.* (1892), A. C. 25. See also *Boots* v. *Grundy*, (1900) 82 L. T. 769.

(*a*) (1881) 6 Q. B. D. 333. This case was followed in *Temperton* v. *Russell*, (1893) 1 Q. B. 715. See, too, the earlier case of *Lumley* v. *Gye*, (1853) 2 E. & B. 216.

the *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* (*a*), it was held that the conduct of a person, or combination of persons, in good faith advising others to break their contractual obligations with third parties affords a ground for action, even though the advice be honest, and free from evidence of malicious intentions.

Motive in use of land.

Again, it has been held that in the use which an owner makes of his land his motive is immaterial. In *Simmons* v. *Lillystone* (*b*), certain timber of the plaintiff's had become imbedded in the soil of the defendant, who caused a saw-pit to be dug on the spot, and the workmen employed cut the timber. In an action for conversion of the timber the defendant justified the cutting as necessary for making the saw-pit and the beneficial and profitable use of his land. It was left to the jury to say whether the defendant had simply dug a hole in order to have a pretext for cutting the timber, or really and *bonâ fide* had an intention of making a saw-pit. This direction was held wrong because the defendant had a right to make a hole in his ground if he pleased; and neither his intention to use it as a saw-pit, nor his good faith, could be enquired into.

In *Corporation of Bradford* v. *Pickles* (*c*) it was held by the House of Lords that a landowner has an absolute right to intercept on his own land underground percolating water and prevent it from reaching the land of his neighbour, even though his motive in so doing be not to benefit himself but to injure his neighbour. "No use of property," said Lord Watson, "which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious" (*d*). In the earlier case of *Crompton* v. *Lea* (*e*) it was alleged in substance that the defendant was proposing to work in such a manner as to let water into the plaintiff's mine, and

(*a*) (1905) A. C. 239.

(*b*) (1853) 8 Exch. 431.

(*c*) (1895) A. C. 587.

(*d*) *Corporation of Bradford* v. *Pickles*, at p. 598. In the Roman Law such interception of underground water was held to be actionable if done maliciously. Marcellus scribit cum eo qui in suo fodiens vicini fontem avertit nihil posse agi nec de dolo actionem; et sane non debere habere si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit (Dig. 29, § 3). But Lord Wensleydale had already in *Chasemore* v. *Richards*, (1859) 7 H. L. C. p. 387, denied that such a doctrine found any place in our law.

(*e*) (1874) L. R. 19 Eq. 115.

that the operation could not benefit the plaintiff, and was not for any proper purpose, and it was decided on demurrer that a right to an injunction was shown. But that decision would seem to rest not on any question of motive, but on the fact that the operation in itself was out of the ordinary and regular course of mining.

Motive when material in nuisance.

To the general rule, however, that liability for damage caused by the use of property is independent of motive, it may be that there is an exception in the case of certain classes of nuisance, where the annoyance is caused by something done in the course of the common and ordinary use or occupation of land or houses, so that the plaintiff will probably have occasion to inflict in his turn upon the defendant, at some future date, a similar annoyance to that of which he complains. Of nuisances of this kind the burning of weeds, emptying of cesspools, making noises during repairs to a house, are instances, with reference to which it has been said that they would be actionable if done wantonly or maliciously, though not otherwise (*a*). And it has accordingly been held that noises, such as that of playing a musical instrument, which are not restrainable as a nuisance in the absence of malice, will be restrained if made maliciously (*b*). The principle of these cases seems to be, not that the annoyance does not amount to a nuisance in the absence of malice, but that it is a nuisance of a kind which must be put up with. The nuisance being reciprocal in its character must be met with mutual forbearance (*c*). But it must be regarded as very doubtful whether since the decision in *Corporation of Bradford* v. *Pickles* that principle can any longer be regarded as good law.

Malicious issue of process.

"An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent" (*d*). There is no such thing as an action for maliciously seizing goods under a distress or execution for rent or for a judgment debt which remains unsatisfied (*e*). If the seizure is legal there is no cause

(*a*) *Per* Bramwell, B., *Bamford* v. *Turnley*, (1860) 3 B. & S. p. 83; *per* Vaughan Williams, J., *Harrison* v. *Southwark & Vauxhall Water Co.*, (1891) 2 Ch. p. 414.

(*b*) *Christie* v. *Davey*, (1893) 1 Ch. 316.

(*c*) *Per* Bramwell, B., (1860) 3 B. & S. p. 84.

(*d*) *Per Cur.*, *Stevenson* v. *Newnham*, (1853) 13 C. B. p. 297; and see *Crowther* v. *Ramsbotham*, (1798) 7 T. R. 654.

(*e*) As to a malicious levy of execution for the whole of a judgment debt

of action at all; if it is illegal the form of action is trespass. In either case the allegation of malice is immaterial. In *Lucas* v. *Nockells* (*a*) the plaintiff was a shipowner and the defendants the consignees of the cargo. A dispute having arisen as to the payment of freight, the defendants took out execution on a judgment which they had against the consignor, went on board the plaintiff's vessel with a sheriff's officer and a warrant, forcibly removed the cargo, and afterwards sold it by auction, having made affidavit at the custom house that they landed it as importers. Lord Tenterden left it to the jury to say whether the goods were *bonâ fide* taken under the execution, or whether it was resorted to as a colourable pretext to enable the defendants to get the cargo without paying freight. The jury having found for the plaintiff, the direction was upheld both in the Exchequer Chamber and the House of Lords. It was conceded, however, that if the execution had been regularly carried out to the end, the motives of the defendants could not have been enquired into, and the case must be considered an illustration of the doctrine of trespass *ab initio*. If a man having begun to act under an authority given by the law afterwards departs from it, he is considered as having been wrong throughout. "If a man has done what he is justified in doing and no more, the law in many cases will not permit his motives to be enquired into; as, if he has a right to prosecute for a crime or to arrest for a debt, there can be no enquiry with what motives these acts are done: but if he does more than, as a prosecutor or creditor, he has a right to do, he will not be justified, and it becomes proper to enquire whether the prosecution and arresting were not mere pretences" (*b*).

In *Oakes* v. *Wood* (*c*) the plaintiff had behaved in a disorderly manner in the defendant's public-house, and he had thereupon forcibly ejected her. She brought an action for assault, and the question was discussed but not decided whether it was open to the plaintiff to prove that though it was justifiable to expel her, the defendant had really acted in mere spite and ill-will. Parke, B.,

after a part has been satisfied, see below, Ch. XIX.; and see *Baker and Wife* v. *Wicks and Others*, (1904) 1 K. B. 743.

(*a*) (1828-33) 4 Bing. 729; 10 Bing. 157.

(*b*) *Per* Best, J., (1828) 4 Bing. p. 744.

(*c*) (1837) 2 M. & W. 791.

said (*a*), "The whole difficulty arises from the decision in *Lucas* v. *Nockells*. If it were not for that case I should have no difficulty. I should have thought that if the defendant had a justifiable cause for turning the party out the motive was wholly immaterial; even though he did it in pursuance of an old grudge it made no difference so long as he did no more than was necessary to turn her out."

Impropriety of means to end.

(b) The second of the two kinds of moral misconduct above mentioned as being material to liability, consists in the use of unfair or improper means to gain a particular end. In certain cases, if one person makes use of either force or fraud to gain a benefit at the expense of another, this conduct will be actionable, though the gaining of the same benefit by other means might be perfectly justifiable. Such impropriety in the means employed is particularly material in the various classes of cases which may be grouped under the head of "competition."

Unfair competition.

No one has a vested right in the carrying on of any trade, profession, or calling, or in the acquisition or disposal of property. We must all take our chance of the intentional competition of others. But every man has a right to a fair chance, and if force or fraud is employed to seduce or deter those who would otherwise have had dealings with him (*b*) or given him employment the right is invaded (*c*). "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. . . . One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. The action there was held not to lie. But suppose Mr. Hickeringill should lie in the way with his guns and frighten the boys from going to school and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars" (*d*). Accordingly, where the captain of a trading vessel on the coast of

(*a*) p. 794. He had dissented in *Lucas* v. *Nockells*.

(*b*) The rule laid down in *Trego* v. *Hunt*, (1896) A. C. 7, that the vendor of the goodwill of a business may not solicit any person, who was a customer of the old business prior to the sale, to continue to deal with the vendor, or not to deal with the purchaser, is of universal application: *Curl Bros., Ltd.* v. *Webster*, (1904) 1 Ch. 685.

(*c*) "What is the definition of a 'fair competition'? What is unfair that is neither forcible nor fraudulent?" *per* Lord Bramwell, (1892) A. C. p. 47.

(*d*) *Per* Lord Holt, C.J., *Keble* v. *Hickeringill*, (1705) 11 East, p. 573 (n.).

Africa fired guns to frighten the natives from resorting to a rival ship, it was held that an action lay (*a*). So it is actionable if an omnibus proprietor, with the view of preventing his rival from having a fair chance of attracting customers to his omnibuses, habitually places his own omnibuses so close behind those of his rival that the doors of the latter are unable to be opened and the access of the passengers thereto is forcibly obstructed (*b*).

Just as a trader has no vested right in the customers who resort to his shop, so a landowner has no absolute right in the game that resorts to his land. But the law will afford the same protection in the one case that it does in the other. It will not allow other persons to employ forcible means to scare away the game from the plaintiff's land or prevent it resorting there. Thus, a person is not justified in firing guns or exploding rockets in the immediate neighbourhood of the plaintiff's decoy pond or grouse-moor with the object of frightening the ducks or game from off the plaintiff's land on to his own land in order that he may have an opportunity of shooting them there (*c*). In *Young* v. *Hichens* (*d*) the plaintiff had partially enclosed in a sein net a large number of fish in the sea, the opening between the end of the net being about seven fathoms, which he was about to close with a stop net, when the defendant rowed up to the opening and disturbed the fish and prevented their capture. The plaintiff brought trespass. It was held the plaintiff could not recover in that form of action, not having sufficiently reduced the fish into possession. Had he sued in case for disturbance there would seem to have been sufficient use of force to have supported the action.

In all these cases, however, if, as is almost invariably the case, the defendant's motive be to benefit himself and not to injure the plaintiff, it is the use of the improper means for gaining his object that alone makes the damage to the plaintiff actionable.

Fair competition.

The defendant's conduct in such cases is sometimes said to be malicious, but the use of the term "malice" in that context

(*a*) *Tarleton* v. *Macgawley*, (1793) Peake, 205. See, too, *Garrett* v. *Taylor*, (1620) Cro. Jac. 567.

(*b*) *Green* v. *London General Omnibus Co.*, (1859) 7 C. B. N. S. 29.

(*c*) *Keble* v. *Hickeringill*, (1705) 11 East, 573 (n.), 11 Mod. 74, 131; *Carrington* v. *Taylor*, (1809) 11 East, 571; *Ibbotson* v. *Peat*, (1865) 3 H. & C. 644.

(*d*) (1844) 6 Q. B. 606.

can only create confusion (*a*). If with the same motive, that of benefiting himself at the plaintiff's expense, he had produced precisely the same damage by other means not involving the use of force or fraud, the plaintiff would have had no ground of complaint (*b*). Thus the setting up of a rival shop or school with the express object of enticing the plaintiff's customers or scholars away is no ground of action, nor is the making of a rival decoy for the purpose of attracting away the plaintiff's ducks (*c*). This difference in the legal consequences of the different means employed to produce the same result is well illustrated by *Ibbotson* v. *Peat* (*d*), where to a declaration for frightening grouse off the plaintiff's land by exploding rockets, the defendant pleaded that the grouse in question were birds which the plaintiff had himself enticed from off the defendant's land by means of corn placed upon his own, and that the acts complained of were merely done for the purpose of recovering the birds. On demurrer the plea was held bad. But, though it was unnecessary to decide the point, Bramwell, B., expressed a strong opinion that the means resorted to by the plaintiff to entice the defendant's game away were not unlawful. "There is nothing," he said, "in point of law to prevent the plaintiff from doing that which the plea alleges he has done. It cannot be contended for a moment that any action would lie against the plaintiff. . . . Where a person's game is attracted from his land he ought to offer them stronger inducements to return to it" (*e*). One fisherman cannot complain if he is frustrated in his expectation of a catch of fish by the anticipation of another (*f*), though it would be otherwise if force were used. One trader may lawfully undersell another with the intention of driving him out of the trade and securing a monopoly for himself. And

(*a*) The term "malice" is also sometimes used in a highly artificial sense in connection with the subject of libel. If a newspaper editor publishes in his paper a letter which he has neglected to read before sending to press, and it turns out to be defamatory, he is liable, and his act in publishing it is said to be malicious; though it is obvious that his mind was purely negative as to motive, the publication having been the result of mere inadvertence.

(*b*) *Boots* v. *Grundy*, (1900) 82 L. T. 769.

(*c*) *Per* Holt, C.J., (1705) 11 East, 573 (n.); Year-Book, 11 Hen. IV. 47.

(*d*) (1865) 3 H. & C. 644.

(*e*) p. 650.

(*f*) *Stevens* v. *Jeacocke*, (1848) 11 Q. B. 731.

equally may a number of traders combine to produce a similar result by similar peaceable means. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (*a*), the defendants were a so-called "conference" of shipowners. They traded to certain ports and acted on a common system of rules for the regulation of freights with the object of keeping the trade of the ports in their own hands. The plaintiffs traded to the same ports independently. The defendants systematically underbid them, and used pressure to prevent shippers giving them cargoes, with the direct object of driving them out of the trade. The plaintiffs in consequence lost business. It was held by the House of Lords that as the acts of the defendants had been done with the lawful object of protecting their own trade, and as they had not employed any unlawful means or been actuated by motives of spite towards the plaintiffs, the plaintiffs had no cause of action. The case was merely an instance of the ordinary expedient of commercial men "of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future" (*b*). But where the combination of parties for the attainment of a particular end, in itself not illegal, is clearly antagonistic to the existing legal right of a third person, to whom one of the parties combining is under a contractual obligation, the interests of the combination must not clash with the existing legal right of the individual; and in the event of a breach of such right, the aggrieved person is entitled to damages. Thus, it has been held that the existence of an agreement between an employer of labour and a trade union, to obey the union rules, is no justification, in an action by a workman against the union, for the latter calling out the employer's

(*a*) (1892) A. C. 25.

(*b*) *Per* Bowen, L.J., in the Court of Appeal, 23 Q. B. D. p. 615. It will be observed that in this case the very same motive which in *Bowen* v. *Hall* (see above, p. 17) was held to be malicious and actionable, namely, a desire on the part of the defendant to benefit himself at the plaintiff's expense, was held to be non-malicious and innocent. The difference between the two cases lies in the difference of the circumstances. In the former, the defendant interfered with the performance of an existing contract, the right to have which performed may be regarded as an absolute right of property. In the latter the defendant only interfered with the plaintiff's chance of making beneficial contracts in the future. (But see the next cases.)

workmen, in consequence of a breach by the employer of the union rules (*a*).

In *Temperton* v. *Russell* (*b*), the defendants, members of a joint committee of certain trade unions connected with the building trade, being desirous of securing that a certain firm of builders should obey the rules of the unions, requested the plaintiff to cease from supplying materials to the firm until the rules were obeyed. The plaintiff refused to do so, whereupon the defendants, in order to compel the plaintiff to comply with their request, persuaded third persons to break certain contracts into which they had already entered with the plaintiff, and also to abstain from entering into any further contracts with him, whereby he suffered damage. The Court of Appeal held that the defendants were liable both for procuring such breaches of contract, and also for conspiring to prevent persons from entering into future contracts with the plaintiff. But it seems difficult, so far as the latter head of that decision is concerned, to distinguish that case from *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (*c*), for the object of the defendants was not to injure the plaintiff as an end in itself, but only to put pressure upon him in order to secure a lawful benefit for themselves, nor did they make use of any force or fraud. The correctness of that decision may therefore be open to question. It was followed by the Court of Appeal in *Flood* v. *Jackson* (*d*), the decision, however, being subsequently reversed by the House of Lords. In this case the (*e*) plaintiffs were journeymen shipwrights employed by the day by a firm of ship repairers. The defendants, who were respectively the chairman, secretary, and district delegate of a trade union, the rules of which the plaintiffs were alleged to have broken, were charged with having maliciously procured the plaintiffs' said employers to abstain from employing them in the future. The jury, in the Court of First Instance, found a verdict in favour of the first two defendants and against the third. In spite of this verdict it was, nevertheless, held by a majority of the House of Lords that the district delegate had violated no legal right of the respondents,

(*a*) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland, and Wales*, (1902) 2 K. B. 732.
(*b*) (1893) 1 Q. B. 715.
(*c*) (1892) A. C. 25.
(*d*) (1895) 2 Q. B. 21.
(*e*) S. C. *sub nom. Allen* v. *Flood*, (1898) A. C. 1.

however malicious and bad his ulterior motives might be, and consequently that he was entitled to judgment. It should, however, always be remembered that the adoption of intimidation, or other violent methods, for the attainment of an ulterior end, not in itself illegal, is an offence at common law (*a*).

In *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, the defendants' motive was to benefit themselves, and not to injure the plaintiffs except incidentally and as a means to that end, and such a motive as between trade competitors was there held to be a perfectly innocent motive. All the Lords, however, were careful to point out that the defendants had not been actuated by malice in the popular sense of the term, thereby suggesting that if they had been so, they would have been liable, notwithstanding that they made use of neither force nor fraud to secure their object. The use of unfair means is material only where the defendants' motive is innocent. The defendants in that case were a combination of persons, and not an individual, and it may be that the majority of the Lords, when making that suggestion, intended it to be understood as applicable only to a case similar to that before them, namely, one in which the damage is caused by several persons acting in concert. Indeed, Lord Halsbury there conceded that "there are many things which might be perfectly lawfully done by an individual which when done by a number of persons become unlawful" (*b*), and expressed an opinion that a combination to insult and annoy a person would be an indictable conspiracy. And Lord Bramwell, who took the same view, explained it by saying that "a man may encounter the acts of a single person, yet not be fairly matched against several" (*c*).

Personal spite.

Conspiracy.

But as to whether an action will lie against several conspirators for an act done by them in concert, which would not be actionable if done by one alone, there does not appear to be any express authority to show. The case of *Gregory* v. *Duke of Brunswick* (*d*), indeed, appears to have been sometimes regarded as suggesting that such an action will lie. But there the question did not

(*a*) *Lyons & Sons* v. *Wilkins*, (1896) 1 Ch. 811, C. A.; S. C. (1899) 1 Ch. 255; and see *Charnock* v. *Court*, (1899) 2 Ch. 35; *Walters* v. *Green*, (1899) 2 Ch. 696.

(*b*) (1895) 2 Q. B. p. 38.

(*c*) p. 45.

(*d*) (1843) 6 M. & G. 953.

arise. In that case the defendants conspired to injure the plaintiff as an actor, and hired other persons to join with them in hissing him, and in pursuance of such conspiracy they hissed him off the stage. Tindal, C.J., directed the jury that if the conspiracy was proved the defendants were liable. But as Coltman J., when subsequently delivering the judgment of the Court, pointed out, the conspiracy there was only material as evidence of malice (*a*). For it is actionable slander in an individual to hiss an actor maliciously, no criticism being justifiable unless honest. The difficulty in the way of holding an individual liable to an action in such a case is that, in the absence of proof of conspiracy (*b*), it is very difficult to prove that he acted from a wrong motive.

On the other hand, Lord Field, in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (*c*), quoted with approval Lord Holt's *dictum* that "where a malicious act is done to a man's occupation . . . there an action lies in all cases" (*d*), and he suggested that the acts of the defendants in the case before him would, if done maliciously in the popular sense of the term, have equally been actionable if done by an individual. In *Flood* v. *Jackson* (*e*) the motive of the defendant appeared to have been spite, a desire to punish the plaintiff for past conduct, and upon that ground, if Lord Field's view is correct, the case might perhaps have been supported. But, as above stated, the Court did not go upon that ground, they drew no distinction between the motive of a desire to benefit oneself at another's expense, and that of a desire to cause injury to another as an end in itself. In the more recent case of *Quinn* v. *Leathem* (*f*) it was held that although "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent"; nevertheless,

(*a*) *Ibid.*, p. 959. The decision on the sufficiency of the pleadings in that case ((1843) 6 M. & G. 205) merely came to this, that in an action for conspiracy a plea justifying one of the overt acts, leaving the others unanswered, is bad. It did not decide that a justification of all the overt acts would not have been a good answer to the conspiracy.

(*b*) In an action for conspiracy, especially if it be for fraudulent misrepresentation, a plaintiff is entitled to full discovery by the defendants (*Boulton and Others* v. *Houlder Bros. & Co.*, (1904) 1 K. B. 784, C. A.).

(*c*) (1892) A. C. p. 51.

(*d*) *Keble* v. *Hickeringill*, (1705) 11 East, p. 573 (n.).

(*e*) (1895) 2 Q. B. 21.

(*f*) (1901) A. C. 495 (Ire.).

"a conspiracy to injure, resulting in damage," does give rise to a civil liability, when the purpose of the combination was "to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing its own interests" (*a*); the ground of the decision apparently being that a conspiracy to injure, apart from the motive of personal aggrandisement, raises a presumption of actionable malice against the conspirators.

Fraud.

There are a variety of cases in which the gist of the action lies in an intent to defraud. In any action founded on a misrepresentation made by the defendant to the plaintiff, which the latter is intended to act upon, and does act upon to his damage, it is essential to show that the misrepresentation was fraudulently made. As above pointed out, if one person fraudulently misleads others into a belief of facts contrary to the truth, with the object of inducing such persons to withdraw their custom from the plaintiff, who suffers damage in consequence, the plaintiff will have a cause of action. It is actionable to sell goods on a market day just outside the limits of the market with the object of defrauding the lord of the market of his toll (*b*).

Infringement of public right.

An infringement of a right which exists for the benefit of the community generally is the subject not of an action but of an indictment (*c*). But if out of the public injury some particular damage to an individual flows, this is a private wrong, and the party aggrieved may sue.

Obstruction of highway.

The common application of this principle takes place where some person suffers a damage peculiar to himself, by reason of an obstruction or other nuisance to a highway. Mere delay and inconvenience is not a particular damage, for that is shared with all those who use the highway. The plaintiff must prove that his person or property were injured, or that he was put to some expense (*d*). Mere loss of custom by

(*a*) *Stevenson* v. *Newnham*, (1853) 13 C. B. 285, at p. 297.

(*b*) Fraud need not, however, be proved in order to support an action for disturbance of market (*Wilcox* v. *Steel*, (1904) 1 Ch. 212, C. A.).

(*c*) An information for an offence under sect. 60 (587) of the Metropolitan Police Act, 1839, may be laid by an inspector of streets as agent for and on behalf of a Borough Council, *Allman* v. *Hardcastle*, (1904) 89 L. T. 553.

(*d*) *Winterbottom* v. *Lord Derby*, (1867) L. R. 2 Ex. 316; *Benjamin* v. *Storr*, (1874) L. R. 9 C. P. 400; as to what causes an obstruction, in respect of which action will lie, see *Dunn* v. *Holt*, (1904) 73 L. J. K. B. 341; *Winsborrow* v. *London Joint Stock Bank*, (1903) 88 L. T. 803.

reason of an obstruction does not under ordinary circumstances afford a cause of action (*a*).

It is a public wrong for a landowner to cut away his own soil and so let in the incursions of the sea, for this is a matter which concerns the general welfare of the realm; and if by so doing he floods any adjacent lands he is liable to the owner for the damage (*b*).

Positive public duties.

The public duties which everybody owes are generally negative in their character; they consist simply in abstaining from the violation of some prohibition. But there are many cases in which the duty is imposed on individuals and classes of doing something for the benefit of the public at large. And here, too, the same rule applies that an action lies for private damage flowing out of a breach of public duty (*c*). Such duties are owed by public officers, and by the undertakers of works intended for the benefit and use of the public at large, such as docks, canals and railways. Landowners may by the express terms of a Crown grant or by prescription be bound to repair a highway or a sea wall (*d*). Any one who holds himself out as a common carrier owes the duty of carrying on reasonable terms for any member of the public, who is willing to pay the proper charge (*e*), all goods which he has convenience for carrying, and in respect of which he holds himself out as a carrier (*f*). Innkeepers owe an analogous duty to receive and accommodate guests (*g*). There are besides a variety of cases in which the owners of ships, mines, machinery, and other property have statutory duties imposed on them for the sake of public safety and convenience.

(*a*) *Ricket* v. *Metropolitan R. Co.*, (1864–7) L. R. 2 H. L. 175.

(*b*) *Attorney-General* v. *Tomline*, (1879–80) 12 Ch. D. 214; 14 Ch. D. 58.

(*c*) *Fergusson* v. *Kinnoul*, (1842) 9 Cl. & F. 251; *Forbes* v. *Lee Conservancy Board*, (1879) 4 Ex. D. 116.

(*d*) *Henly* v. *Mayor of Lyme Regis*, (1834) 5 Bing. 91; 3 B. & Ad. 77.

(*e*) The expression generally used is that the proper charge must be tendered. A formal tender, however, in the strict sense is not necessary, *Pickford* v. *Grand Junction R. Co.*, (1841) 8 M. & W. 372; see, however, *Fell* v. *Knight*, (1841) 8 M. & W. 269.

(*f*) *Pickford* v. *Grand Junction R. Co.*, *supra*; *Garton* v. *Bristol & Exeter R. Co.*, (1861) 1 B. & S. 112; *Johnson* v. *Midland R. Co.*, (1849) 4 Ex. 367.

(*g*) *Fell* v. *Knight*, *supra*; see *Thompson* v. *Lacy*, (1820) 3 B. & Ald. 283. The obligation to receive guests, is confined to travellers. Innkeepers are not bound to entertain guests permanently, *Lamond* v. *Richards*, (1897) 1 Q. B. 541.

Special damage from breach of public duty not always a cause of action.

It is not, however, in every case that a party is entitled to maintain an action by reason of his having suffered some particular damage from which the due fulfilment of some public duty would have saved him. It must further appear that his damage was within the mischief against which the law intended to provide. In *Gorris* v. *Scott* (*a*) the defendant had carried on his vessel certain sheep for the plaintiff and had omitted to pen them in accordance with the regulations made under the Contagious Diseases (Animals) Act of 1869. The sheep were washed overboard, which would not have been the case had they been penned as required by the Act. It was held, however, that the owner could not recover, because the object of the regulations was to prevent contagion and not to provide for safe carriage. So, if infected animals are exposed for sale in a market contrary to law, whatever other remedy a purchaser from whom their state is concealed may have, he cannot sue as for damage sustained by the breach of public duty, since the object of the law is to check the spread of contagion and not to protect individual purchasers (*b*).

Even, however, where a party has suffered the very damage against which some statutory obligation is provided as a safeguard, he will not necessarily have any right of action. The whole language and scope of the statute must be carefully considered in order to discover whether it was the intention of the Legislature to give by implication such a remedy (*c*). But the general rule would seem to be that where a statute imposes a penalty for the breach of the duty which it creates there is no right of action. The presumption is that the Legislature considered the penalty sufficient protection (*d*). In such and cognate cases, the question whether an action will lie for breach of a statutory duty probably depends mainly upon the nature of the injury likely to arise from a breach, and the amount and allocation of the penalty imposed. "If it be found that the remedy

(*a*) (1874) L. R. 9 Ex. 125.

(*b*) *Ward* v. *Hobbs*, (1877) 3 Q. B. D. 150; 4 App. Cas. 13.

(*c*) See *Atkinson* v. *Newcastle Waterworks Co.*, (1877) 2 Ex. D. 441, in which the earlier decision of *Couch* v. *Steel*, (1854) 3 E. & B. 402, was called in question. See, too, *Vallance* v. *Falle*, (1884) 13 Q. B. D. 109.

(*d*) See *Institute of Patent Agents* v. *Lockwood*, (1894) A. C. 347; and *per* Lord Hobhouse, *Municipality of Pictou* v. *Geldert*, (1893) A. C. p. 525.

provided by statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration." But, "although it may be a cogent and weighty consideration, other matters have also to be considered" (*a*).

Torts in the course of executing public duty.

It is necessary to distinguish between mere breaches of duty and wrongful acts done in the supposed execution of a duty. If, for instance, a sheriff, in order to execute a writ goes where he has no right to go, he is liable, not because he has omitted to do his duty, but because he has committed a trespass, and it will be immaterial whether he has caused damage or not. It is further to be observed that out of a public duty a private duty may arise for the breach of which an action will lie without proof of damage. Thus it has been held that a sheriff might be sued by an execution creditor where he had permitted the debtor arrested on final process to be a short time out of custody, for that it was the right of the creditor to have his debtor constantly detained, and the infringement of this right was a good cause of action without damage (*b*).

Private duty arising out of public duty.

Public officers.

A subordinate public official owes his duty to the public whose servant he is, not to his official superior, and for a breach of that duty an action may lie against him but will not lie against the superior (*c*). On the other hand, where a person charged with a public duty employs for the purpose of discharging it his own servant he will be answerable for the acts and omissions of the servant (*d*) just as any other master, while the servant owing no duty to the public cannot be charged for any mere omission, though of course he is answerable for positive wrong-doing.

Nor does the protection given by the Public Authorities Protection Act, 1893, extend to an independent contractor doing under

(*a*) *Groves* v. *Wimborne* (*Lord*), (1898) 2 Q. B. 402, Vaughan Williams, L.J., at p. 416.

(*b*) *Clifton* v. *Hooper*, (1844) 6 Q. B. 468; see below, p. 134.

(*c*) *Lane* v. *Cotton*, (1701) 12 Mod. 472; *Whitfield* v. *Lord Le Despencer*, (1778) 2 Cowp. 754; *Barry* v. *Arnaud*, (1839) 10 A. & E. 646; see below, p. 41.

(*d*) *Mersey Docks Trustees* v. *Gibbs*, (1864–5) L. R. 1 H. L. 93. Previously to this case, the general current of authority was to the effect that persons charged with public duties which must needs be performed through the agency of others were only bound to take due care in the choice of their agents. See *Sutton* v. *Clarke*, (1815) 6 Taunt. 29. Note in this connection the Public Authorities Protection Act, 1893.

contract, and for his own profit, work which a public authority has been authorised to do (*a*).

Non-repair of highways.

Of the duties imposed on public bodies, one of the most important is that connected with the repair of highways. By the common law the duty of keeping highways in proper repair rested in general upon the inhabitants of the parish in which they were situate; the exception being where that duty lay upon the adjoining landowner *ratione tenuræ*. It has been settled law from very early times that the duty of the parish to repair the highways was one for the breach of which the only remedy was by criminal proceedings, by presentment, or at a more modern date by indictment. No action could be maintained against the parish for personal injuries or other special damage suffered by a member of the public in consequence of the defective condition of a highway. And the same exemption from liability to action applied to the inhabitants of a county in respect of the non-repair of county bridges.

It has, however, been held that the rule laid down by the Statute of Bridges (*b*), which provides that the persons liable to repair a bridge are also liable to repair the highway at each end of the bridge for a distance of 300 feet, applies where a bridge is repairable by the county.

Where, however, the original liability to repair the bridge is imposed specifically by a later statute, apart from express obligation in such statute, there is no responsibility to repair the highway at either end (*c*).

For this absence of remedy by action two different reasons have been given at different times, neither of which seems to have been wholly satisfactory. In early times the reason given was that as the neglect to repair was an offence against the public at large, all proceedings ought to be taken on behalf of the whole public by means of presentment at the court leet, and not by each individual who happened to be damaged. In the Year-Book, 5 Edw. IV. p. 2, pl. 24, it is said, "If there be a common way, and it be not repaired, so that I am damaged by the mireing

(*a*) *T. Tilling, Ltd.* v. *Dick, Kerr & Co., Ltd.*, (1905) 1 K. B. 562.

(*b*) 22 Hen. VIII. c. 5.

(*c*) *Hertfordshire County Council* v. *The Governors and Company of the New River*, (1904) 2 Ch. 513.

of my horse, I shall not have any action against him who ought to repair the way, mes ceo est action populer (*a*), en quel case nul home singuler avera action de case, mes ceo est action per voy de presentment." In other words, the reason why the action would not lie at that day (A.D. 1466) was to be found in the necessity of avoiding a multiplicity of actions.

If indeed that were the only reason, it would be wholly insufficient, for a nuisance to a highway by an act of misfeasance as by digging a trench across it, was equally an offence against the public at large, and was equally matter for presentment, and yet there is no doubt that for such a misfeasance a civil action lies at the suit of any individual who suffers special damage from it. But the answer is, that at that day the modern doctrine of special damage—namely, that the existence of a common law duty towards the public at large gives rise to a private duty towards individuals not to inflict on them by a breach of the public duty some peculiar damage over and above that suffered by the rest of the public—was practically unknown (*b*).

(*a*) This phrase "action populer" is not here used in its usual signification of a penal action by a common informer (see Brooke, Abr. tit. "Action populer"), but in the wider sense that the matter of complaint is common to the whole public. It may be observed that Brooke's note of this case in Br. Abr. tit. Action sur le case, 93, in which he uses the words "car est popul," has been repeatedly misconstrued to mean, that the reason for the action not lying was that the public (*populus*) were liable to repair; *e.g.*, in the argument of Mr. Chambre and judgment of Ashhurst, J., in *Russell* v. *Men of Devon*, (1788) 2 T. R. 667; *per* Alderson, B., arg. in *M'Kinnon* v. *Penson*, (1853) 8 Ex. at p. 321; and in the judgment of Hannen, J., in *Gibson* v. *Mayor of Preston*, (1870) L. R. 5 Q. B. at p. 222; and of Lord Halsbury, in *Cowley* v. *Newmarket Local Board*, (1892) A. C. at p. 350. The origin of this mis-translation is traceable to Viner, who, in his Abridgment, tit. "Chimin Common," D. 2, copied Brooke, and instead of verifying Brooke's reference to the Year Book, guessed wrongly at the omitted letters in the abbreviation "popul." See the argument in *Rundle* v. *Hearle*, (1898) 2 Q. B. 83.

(*b*) The earliest trace of such a doctrine appears to be in a judgment of Fitzherbert, J., in the Year Book, 27 Hen. VIII. p. 27, in the course of which he says that, "if one make a ditch across a highway, and I come riding along the way in the night, and I and my horse get into the ditch whereby I suffer great damage . . . I shall have an action against him who made the ditch across the way because I am more damaged by it than any other person." The action there was for stopping a highway whereby the plaintiff was prevented from getting from his house to his close. Fitzherbert, J., held the action lay. But Baldwin, C.J., held that it did not; he did not go on the ground that there was not sufficient special damage, but on the broad ground that under no circumstances would a civil action lie for a public nuisance. In Co. Litt. 1, s. 68, Coke states the law in accordance with Fitzherbert's view,

Later on the reason given was, that "because a foundrous way, a decayed bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county, who are not corporate, therefore no action lies against them for a particular damage" (*a*). And this was the ground upon which it was decided in *Russell* v. *Men of Devon* (*b*) that no action will lie against the inhabitants of a county for an injury sustained in consequence of the non-repair of a county bridge. This reason also seems to be insufficient, for if the fact of the parish or county being an undefined body was no objection to its being indicted and fined, it is difficult to see why it should be any objection to its being sued for damages. But, whatever the reason of the rule may have been, the rule itself became firmly ingrained in the law, so much so, indeed, that it was unaffected on the one hand by the introduction of the general doctrine that special damage resulting from a public nuisance is cause of action, and on the other by the transfer by statute of the liability to repair to individuals or corporations, and the consequent removal of the objection that an undefined body could not be sued. Thus it has been held that no action for damage caused by non-repair lay against a surveyor of highways appointed under the Highways Act, 1835 (*c*), or a county surveyor under 43 Geo. III. c. 59 (*d*), or a vestry under the Metropolis Management Acts (*e*), or a local board under the Public Health Acts (*f*), although in all these cases the obligation to repair was imposed by statute on the parties sued. And the same principle applies to the county, urban district, and rural district councils, to whom the duty of repairing the various roads throughout the country has now been transferred. In the absence

and says that it was so resolved in the King's Bench; he does not give the name of the case, although he cites 27 Hen. VIII. 27 in the margin, but he was evidently referring, not to Fitzherbert's judgment in that case, but to a case recently decided, as he mentions the fact that in that case reference was made to a case of *Westbury* v. *Powell*, of which no mention is to be found in 27 Hen. VIII. 27. The doctrine of special damage was probably only newly established in Coke's day.

(*a*) *Thomas* v. *Sorrell*, (1674) Vaugh. at p. 340.

(*b*) (1788) 2 T. R. 667.

(*c*) *Young* v. *Davis*, (1862) 7 H. & N. 760.

(*d*) *M'Kinnon* v. *Penson*, (1853) 8 Ex. 319.

(*e*) *Parsons* v. *St. Matthew, Bethnal Green*, (1867) L. R. 3 C. P. 56.

(*f*) *Gibson* v. *Mayor of Preston*, (1870) L. R. 5 Q. B. 218; *Cowley* v. *Newmarket Local Board*, (1892) A. C. 345; see, too, *Municipal Council of Sydney* v. *Bourke*, (1895) A. C. 433.

of a clearly expressed intention to the contrary, it must be presumed that the Legislature meant to confer no wider remedy against the new highway authorities than existed against their predecessors. Nor will the Court prescribe what particular works or repairs are necessary for the maintenance of roads, or issue a *mandamus* against a local authority to do any particular works (*a*). "It must now be taken as settled law, that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance (*b*). In order to establish such liability, it must be shown that the Legislature has used language indicating an intention that the liability shall be imposed" (*c*).

And it is apprehended that the same principle equally applies to the case of an individual liable to repair *ratione tenuræ* (*d*). That liability was in its origin presumably transferred from the parish, and it is to be presumed that the Crown in granting the land to be held on the conditions of that transfer intended to give no wider remedy against the grantee than theretofore existed against the parish. No case is to be found in the books in which an action for non-repair has been held to lie against one liable to repair *ratione tenuræ*. The case in the Year Book above referred to (5 Edw. IV. p. 2, pl. 24) is a direct authority that such an action will not lie. And Martin, B., in *Young* v. *Davis* (*e*), and Lord Russell, C.J., in *Rundle* v. *Hearle* (*f*), though leaving the point open, expressed a strong opinion against the maintenance of the action.

Misfeasance in management of highways.

But for misfeasance, as opposed to mere non-feasance or neglect to repair, the highway authority is liable to an action. Thus where a heap of stones or rubbish had been placed by the wayside for the purpose of mending the road, and had been left at night without any precautions, a plaintiff who drove against the obstruction and suffered damage was held entitled to recover

(*a*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. 336.

(*b*) *Maguire* v. *Corporation of Liverpool*, (1905) 1 K. B. 767, C. A.

(*c*) *Municipality of Pictou* v. *Geldert*, (1893) A. C. at p. 527.

(*d*) As to liability *ratione tenuræ* for repair of bridges, see *Hertfordshire County Council* v. *New River Co.*, (1904) 2 Ch. 513.

(*e*) (1862) 7 H. & N. 760, at p. 772.

(*f*) (1898) 2 Q. B. 83, at p. 88.

against the highway authority (*a*). And for the purposes of this distinction between misfeasance and non-feasance the neglect of the local authority to repair a permanent artificial structure belonging to them under or upon the highway, such as a barrel drain (*b*), or a sewer grating (*c*), which by reason of such non-repair becomes dangerous, will be treated as a misfeasance; and this whether they created the artificial structure themselves (*d*), or whether it became vested in them by transfer from another body (*e*).

Repair of public bridges.

As stated above, the liability of the county council in respect of the bridges which they are bound to repair, stands upon the same footing as the liability of the highway authority to repair the highways; damage resulting from mere non-repair of a bridge does not, however, give any cause of action (*f*).

Neglect to provide sewers.

Neglect by a local authority to make the necessary sewers which, by the provisions of the Public Health Act, they are under a duty to provide, does not give rise to a cause of action, even though followed by special damage (*g*); the only remedy is complaint to the Local Government Board (*h*).

Public duties at common law—extent of liability.

The general rule of liability in the case of public duties imposed by the common law is that the party is liable to fulfil the duty in all events save only where he is prevented by the act of God or the king's enemies. Such is the liability of a common carrier or an innkeeper (*i*). The rule, however, is not universal. Thus a sheriff is bound absolutely to keep a prisoner in safe

(*a*) *Mayor and Corporation of Shoreditch* v. *Bull*, (1904) 90 L. T. 210, H. L.; *Foreman* v. *Mayor of Canterbury*, (1871) L. R. 6 Q. B. 214; see also *Smith* v. *West Derby Local Board*, (1878) 3 C. P. D. 423.

(*b*) *Borough of Bathurst* v. *Macpherson*, (1879) 4 A. C. 256, P. C., as explained in *Municipal Council of Sydney* v. *Bourke*, (1895) A. C. 433, P. C.

(*c*) *White* v. *Hindley Local Board*, (1875) L. R. 10 Q. B. 219.

(*d*) *Borough of Bathurst* v. *Macpherson*, *supra*.

(*e*) *White* v. *Hindley Local Board*, *supra*.

(*f*) *Russell* v. *Men of Devon*, (1788) 2 T. R. 667.

(*g*) As to the extent to which neighbouring authorities may be called upon to contribute to the cost of repairs, upon the ground that they are "adjacent to" and consequently interested in such repairs, see *Mayor and Councillors of the City of Wellington* v. *Mayor and Councillors of the Borough of Lower Hutt*, (1904) A. C. 773.

(*h*) *Robinson* v. *Corporation of Workington*, (1897) 1 Q. B. 619, C. A.; *Peebles* v. *Oswaldtwistle Urban Council*, (1897) 1 Q. B. 625, C. A.

(*i* *Forward* v. *Pittard*, (1785) 1 T. R. 27.

custody, subject only to the exception mentioned (*a*); but in most cases want of care or energy must be proved against him. If there is an unnecessary delay in the execution of a *fi. fa.* and the process is thereby rendered abortive, it is still a question for the jury whether this amounts to negligence (*b*).

He who has a franchise of a market, is under a liability towards those who use the market to take reasonable care that the premises are in a safe condition (*c*).

Liability when duty arises out of statute.

The extent of a statutory liability must of course in each case depend upon the scope and intention of the particular statute in question. The liability imposed may be absolute and subject to no exception whatever. "If an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which on such an hypothesis he . . . is by the statute ordered to do, namely, to be liable for the damages" (*d*).

Where, without any consideration in return, a public duty is imposed by statute, the presumption is that the person owing the duty is only liable in case of negligence. "It would seem to me," says Brett, J., "to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty may notwithstanding be absolute; but if so it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view it ought not to be so construed as to inflict a liability unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the

(*a*) Buller, N. P. p. 63.

(*b*) *Hobson* v. *Thellusson*, (1867) L. R. 2 Q. B. 642.

(*c*) *Lax* v. *Corporation of Darlington*, (1879) 5 Ex. D. 28.

(*d*) *Per* Lord Cairns, *River Wear Commissioners* v. *Adamson*, (1876) 2 App. Cas. p. 750. See; too, *Nitro-Phosphate & Odams Chemical Manure Co.* v. *London & St. Katharine Dock Co.*, (1878) 9 Ch. D. 503.

duty imposed" (*a*). Thus a local authority in whom a sewer is vested, is not, in the absence of negligence, liable for an accident arising from the sewer being out of repair (*b*).

Nor is a local authority amenable to action when, in the reasonable exercise of its powers and for the public convenience, it decides on a course of action in a particular locality which adjacent owners fear will injure their property (*c*).

Where a corporation was empowered to make, erect, alter, maintain, repair, widen, deepen, scour, and cleanse certain water channels, it was held that they were bound to use these powers whenever occasion required for the purpose of preventing the flooding of the adjoining lands (*d*). But where certain powers were given solely for the purpose of the navigation of a river, and the defendant in pursuance of those powers erected certain staunches which caused accumulation of mud and weeds, and the river thereby overflowed and damaged the plaintiff, it was held that the defendants were not liable because they had no right or duty to do anything except for navigation purposes, and the mud and weeds did not interfere with the navigation (*e*).

Duty involving the exercise of a discretion.

As a general rule, where the discharge of a public duty involves the exercise of a discretion no action lies if the discretion has been fairly and honestly exercised (*f*). Thus, it has been decided that guardians of the poor are not responsible, in their corporate capacity, for the negligence of their officials in the treatment of patients in a workhouse hospital, apparently upon the ground that the negligence of officials, in the selection of whom the guardians had exercised due diligence, could not relate back to the guardians, because the duty of selection had been fairly and honestly exercised by them (*g*). However, in *Cooper* v. *Wands-*

(*a*) *Hammond* v. *Vestry of St. Pancras*, (1874) L. R. 9 C. P. 322.

(*b*) *Hammond* v. *Vestry of St. Pancras*, (1874) L. R. 9 C. P. 316; *Lambert* v. *Lowestoft Corporation*, (1901) 1 Q. B. 590, in which latter case *dicta* of Lord Herschell to the contrary in *Municipal Council of Sydney* v. *Bourke* are explained.

(*c*) *Mayo* v. *Seaton Urban District Council*, (1904) 68 J. P. 7.

(*d*) *Geddis* v. *Proprietors of the Bann Reservoir*, (1878) 3 App. Cas. 430.

(*e*) *Cracknell* v. *Mayor of Thetford*, (1869) L. R. 4 C. P. 629.

(*f*) *Tozer* v. *Child*, (1856) 6 E. & B. 289; 7 E. & B. 377; *Partridge* v. *General Council of Medical Education*, (1890) 25 Q. B. D. 90.

(*g*) *Dunbar* v. *Guardians Ardee Union*, (1897) 2 Ir. R. 76.

worth Local Board (*a*), where the defendants under 18 & 19 Vict. c. 120, s. 76, had power, in default of notice given by a building owner, to order the demolition of the house, and exercised it without giving the owner an opportunity of being heard, it was held that they were liable in trespass, insomuch as the discretion vested in them was not arbitrary in its nature, but judicial, and had not been exercised at all (*b*).

(*a*) (1863) 14 C. B. N. S. 180.

(*b*) See *Hopkins* v. *Smethwick Local Board*, (1890) 24 Q. B. D. 712, and cp. *Vestry of Clerkenwell* v. *Feary*, (1890) 24 Q. B. D. 703; and *Attorney-General* v. *Hooper*, (1893) 3 Ch. 483.

CHAPTER II.

PARTIES.

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As a general rule all persons are entitled to sue and liable to be sued in actions of tort; but this rule is subject to certain exceptions.

The Crown cannot be sued for a tort, but its agents can.

The sovereign cannot be sued. A petition of right will not lie for a tort (*a*), for "the king can do no wrong" (*b*). But this exemption of the sovereign from liability is personal; it does not extend to public officers of state acting on behalf of the Crown; for the maxim that the king can do no wrong involves the proposition that he cannot authorise a wrong, and, "as the sovereign cannot authorise a wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown" (*c*). The agent is responsible, even though the act be directly ordered by the Crown (*d*). Whether the case of a soldier acting under the orders of his superior officer forms any exception to the general rule has never been decided, but presumably it does not (*e*). An action of tort when brought against an officer of state must be

(*a*) *Tobin* v. *Queen*, (1864) 16 C. B. N. S. 310; *Feather* v. *Queen*, (1865) 6 B. & S. 257; *Viscount Canterbury* v. *Attorney-General*, (1842) 1 Phillips, 306.

(*b*) Hale, P. C., Vol. 1, p. 43.

(*c*) *Per* Cockburn, C.J., (1865) 6 B. & S. p. 296.

(*d*) *Rogers* v. *Rajendro Dutt*, (1860) 13 Moore, P. C. p. 236.

(*e*) See *Keighly* v. *Bell*, (1866) 4 F. & F. 763, Willes, J., pp. 790 and 805. With respect to the responsibility of

brought against him personally; the Government revenue cannot be reached by an action against a public officer in his official capacity (*a*).

To this rule, however, that agents of the Crown are personally liable for torts committed by them as such, an exception exists in cases in which the party injured is the subject of a foreign state. An injury inflicted upon a foreigner, if done by the authority of or ratified by the Crown, cannot give rise to a cause of action. Thus, where a commander of a British ship, employed in the suppression of the slave trade, burnt the barracoons of a Spanish slave-dealer, and his act was subsequently ratified by the British Government, it was held that such ratification was a defence to an action against him at the suit of the slave-dealer (*b*), upon the ground that "where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the Government of this country, it becomes the act of the State, and the private right of action becomes merged in the international question which arises between our Government and that of the foreigner" (*c*).

Again, the liability of public officers of state is limited to torts which they have personally committed or actually authorised; they are not responsible for the negligence or unauthorised torts of their subordinate officials (*d*). "The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not on

soldiers who fire upon a riotous mob, it has been said that "the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen." *Per* Tindal, C.J., 5 C. & P. p. 263 (n.). And although it may be (as has been suggested in Sir J. Stephen's History of the Criminal Law, Vol. 1, p. 205, and in Dicey on The Constitution, p. 284) that a soldier, who in obedience to an order of a superior officer, unjustifiably given, fires upon and kills or injures persons engaged in a riot, is not criminally responsible if the order was given under such circumstances that the soldier might reasonably suppose the superior to have good grounds for giving it, that question will not affect his civil responsibility, which must be wholly independent of his belief. For further discussion on this subject, see below, p. 72.

(*a*) *Palmer* v. *Hutchinson*, (1881) 6 App. Cas. 619.

(*b*) *Buron* v. *Denman*, (1848) 2 Exch. 167.

(*c*) *Per* Cockburn, C.J., (1865) 6 B. & S. p. 296.

(*d*) *Whitfield* v. *Lord Le Despencer*, (1778) 2 Cowp. 754.

that account subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability" (*a*). The reason of this is, that the subordinate officials are the servants of the Crown and not of the superior officer who selects them (*b*). The fact, however, that a public body acts for the whole nation at large does not necessarily make it a Crown department for this purpose; such a public body, if it employs its own subordinate officers and other agents on its own behalf and not on behalf of the Crown, is liable for the torts of its agents to the same extent as any private employer would be liable (*c*).

Foreign sovereigns.

An action will not lie against a foreign sovereign, for he is exempt from the jurisdiction of our Courts, on the ground that "the exercise of such jurisdiction would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority" (*d*). And not only can he not be sued personally, but neither can an action *in rem* be brought against his property, for the attaching of the *res* is an indirect impleading of its owner (*e*), and the fact that the foreign sovereign uses the *res* for trading purposes, and not for public purposes directly connected with the *jus coronæ*, makes no difference (*f*).

Ambassadors.

Ambassadors also who are accredited to this country by a foreign government are free from the jurisdiction of our Courts, on the ground that they are the representatives of the sovereign or state which sends them; and the fact that an action brought against an ambassador may arise out of commercial transactions in which he is engaged is immaterial (*g*). "This immunity extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides" (*h*).

(*a*) *Per* Lord Lyndhurst, *Viscount Canterbury* v. *Attorney-General*, (1842) 1 Phillips, p. 324.

(*b*) See below, p. 72.

(*c*) *Gilbert* v. *Corporation of Trinity House*, (1881) 17 Q. B. D. 795.

(*d*) *Per* Brett, L.J., *The Parlement Belge*, (1880) 5 P. D. p. 207; and see *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149, C. A.

(*e*) *The Parlement Belge*, (1880) 5 P. D. 197; *Varasseur* v. *Krupp*, (1878) 9 Ch. D. 351.

(*f*) *The Parlement Belge*, *supra*.

(*g*) *Magdalena Steam Navigation* v. *Martin*, (1859) 2 E. & E. 94.

(*h*) Wheaton, Int. Law, Ed. 1866, s. 225.

This rule holds good even when the ambassador so accredited to this country is a British subject, unless he has been received by the British Government on the express terms of his being subject to the jurisdiction of our Courts (*a*). The privilege of an ambassador extends up to a reasonable time after presenting his letters of recall (*b*). Whilst the privilege continues the Statute of Limitations does not begin to run against his creditors (*c*).

A foreign sovereign or ambassador may waive his privilege, and if he appears and defends up to judgment, it is then too late to have the proceedings stayed (*d*). But nothing short of appearance will amount to submission to the jurisdiction. The privilege cannot be waived by anything done before action brought. Thus the fact of a foreign sovereign residing in this country and entering into a contract under an assumed name, as if he were a private individual, does not amount to a submission to the jurisdiction (*e*). Moreover, where a foreign sovereign by suing in the Courts of this country actually submits to the jurisdiction, such submission is strictly limited in its character, and will only entitle the defendant to obtain discovery of documents and set up a counterclaim by way of defence (*f*).

When felons may sue.

A felon could not by the common law sue for torts to his property, for his property was forfeited to the Crown; but forfeiture for felony has now been abolished by the Felony Act, 1870 (*g*). By that Act the right to sue for any injury to the property of a convict (which term is defined to mean any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony (*h*)) is vested in the administrator or interim curator, as the case may be, during the time that the convict is subject to the operation of the Act, that is to say, until the convict's death, bankruptcy, or the completion of his term of punishment, original or substituted, or

(*a*) *Macartney* v. *Garbutt*, (1890) 24 Q. B. D. 368.

(*b*) *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352.

(*c*) *Ibid.*

(*d*) *Taylor* v. *Best*, (1854) 14 C. B. 487.

(*e*) *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149.

(*f*) *South African Republic* v. *Compagnie Franco-Belge du Chemin de Fer du Nord*, (1898) 1 Ch. 190.

(*g*) 33 & 34 Vict. c. 23, s. 1.

(*h*) s. 6.

until he shall have received a royal pardon (*a*); subject to this exception, that a convict may sue in respect of any property acquired by him while lawfully at large under a ticket of leave (*b*). A felon who is not a convict as above defined, such as one who has been sentenced to a term of imprisonment only, may apparently sue for torts to his property in his own name. Even at common law a felon might sue for any personal wrong, such as assault or slander (*c*); and it is apprehended that he may still do so in his own name, notwithstanding the language of s. 8 of the above Act, which provides that no action for the recovery of "any damage whatsoever" shall be brought by any convict while he is subject to the operation of the Act, for the term "damage" in that section must probably be understood as confined to damage to property. If it were otherwise, the convict might be altogether without redress, for actions for personal damage do not pass to the administrator. It has, however, been decided that a person who has been convicted of a crime, is not entitled, so long as the sentence is unreversed, to maintain an action against a witness for negligently giving false evidence upon his trial, although such evidence largely conduced to his wrongful conviction, a determination of the proceedings in favour of the accused being a condition precedent to action under such circumstances (*d*).

Bankrupts.

Bankrupts may be sued for torts of all kinds, whether committed before or during the bankruptcy; bankruptcy does not operate as a discharge of a tort, for demands for unliquidated damages founded on tort are not debts provable against the bankrupt's estate (*e*).

A bankrupt cannot sue for any direct tort to property belonging to him at the date of the bankruptcy; the cause of action for any injury whereby the estate divisible among the creditors is directly diminished, belongs to the trustee (*f*).

(*a*) ss. 10, 24.

(*b*) s. 30.

(*c*) Com. Dig. Forfeiture, B. 2.

(*d*) *Bynoe* v. *Bank of England*, (1902) 1 K. B. 467, C. A.

(*e*) 46 & 47 Vict. c. 52, s. 37. As to whether the action of a judgment debtor presenting his own petition in bankruptcy to avoid payment amounts to an abuse of the process of the Court see *Archer, In re; Archer, Ex parte*, (1904) 20 T. L. R. 390.

(*f*) *Hodgson* v. *Sidney*, (1866) L. R. 1 Ex. 313; *Morgan* v. *Steble*, (1872) L. R. 7 Q. B. 611.

But for injuries of a personal character, such as libel or assault, or the seduction of his servant (*a*), a bankrupt may sue. In some cases the act complained of may be such as to give rise to both kinds of damage, both a damage to property, and also a damage of a personal character; and in such cases the question as to what extent the cause of action will pass to the trustee seems to depend upon the following rules:—

(a) If only one of the two kinds of damage suffered is the direct consequence of the defendant's act, and the other is consequential merely, so that there is but one cause of action, then if the damage which is directly suffered is a damage to property, the cause of action passes to the trustee, and the bankrupt's remedy in respect of the injury to himself is gone; but if the damage which is directly suffered is of a personal character, the whole cause of action remains in the bankrupt. Thus, where the bankrupt is induced by the defendant's fraud to incur liabilities in consequence of which he is rendered insolvent and injured in credit and character, the primary damage being the pecuniary loss and the cause of action in respect of it passing out of the bankrupt, he is not entitled to say that enough of that cause of action remains in him to enable him to recover in respect of the consequential injury to his character (*b*), for a single cause of action cannot in such circumstances be split (*c*). So, on the other hand, where a person has been libelled, and the injury occasioned by the libel to such person's reputation has brought about his insolvency, the trustee cannot sue for the damage to the bankrupt's estate (*d*).

(b) If the act of the defendant be such as to give rise simultaneously to two distinct causes of action, one in respect of a damage to property, the other in respect of a personal damage, as for instance where a carriage which the bankrupt is driving is run into, and both carriage and driver are injured (*e*), the trustee may sue for the one and the bankrupt for the other (*f*).

(*a*) *Howard* v. *Crowther*, (1841) 8 M. & W. 601.

(*b*) *Hodgson* v. *Sidney*, (1866) L. R. 1 Ex. 313; *Morgan* v. *Stable*, (1872) L. R. 7 Q. B. 611.

(*c*) *Per* Bramwell, B., (1866) L. R. 1 Ex. p. 316

(*d*) *Per* Alderson, B., (1841) 8 M. & W. p. 604.

(*e*) *Brunsden* v. *Humphrey*, (1884) 14 Q. B. D. 141.

(*f*) *Per* Bramwell, B., (1866) L. R. 1 Ex. p. 316.

(c) Intermediate between the two above classes of cases is that of a trespass to land or goods of which the bankrupt has the bare possession, and the trustee has the property; in which case it appears that the bankrupt may sue for the invasion of his possession, and recover damages nominal or substantial according as the trespass was or was not accompanied with matter of aggravation, and the trustee may sue in respect of his property or right of possession, and recover damages for any injury done to the land or any damage to or conversion of the goods. The authorities, indeed, only decide that the bankrupt may sue in respect of his possession; they do not expressly decide that he cannot recover in such action for the injury to the property, but they seem so to suggest (*a*). The point, however, is not clear.

Any property which a bankrupt may acquire after his adjudication and before his discharge is, until the trustee intervenes, to be regarded as the property of the bankrupt (*b*). For any torts to such property, therefore, the bankrupt, in the absence of any intervention by the trustee, may sue.

Infants—how far tenderness of age material to their liability.

Infants are liable to be sued for torts of all kinds, and except when the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial (*c*). Thus a child, however young, will be liable for the consequences of a direct trespass, although his youth may have rendered him unable to foresee those consequences; it will be sufficient to fix him with liability that he intended to do the physical act which constituted the trespass. In *Mangan* v. *Atterton* (*d*), where a child aged four put his fingers between the cogs of a machine while his schoolfellows turned the handle, and then sought to recover damages from the owner of the machine for exposing it unfenced in a public place, Bramwell, B., said: "Suppose this machine had been of very delicate construction and had been injured by the

(*a*) *Brewer* v. *Dew*, (1843) 11 M. & W. 625; *Rogers* v. *Spence*, (1844) 13 M. & W. 571; 12 Cl. & F. 700.

(*b*) *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262.

(*c*) As, however, apart from special contract, a parent is not responsible to a third party for the debts or torts of his child, the utility of taking proceedings against a child is, in the majority of cases, problematical. See McQueen, Law of Husband and Wife, 4th ed. p. 82.

(*d*) (1866) L. R. 1 Ex. p. 240.

child's fingers, would not the child in spite of his tender years have been liable to an action?"

But where the cause of action depends on the malice or the negligence of the defendant, the child's age will be material, and it will be a question for the jury whether he was of such an age that he ought to have foreseen the consequences of his act, and that malice or want of due care could reasonably be predicated of him (*a*).

Infant when liable in trover for goods delivered to him under a contract.

Where a cause of action is really founded upon contract, the plaintiff cannot avoid the defence of infancy by framing his action in tort. If goods are delivered to an infant under a contract of sale, and the infant was not guilty of any deception in concealing his infancy from the vendor, the latter cannot in an action of trover recover the goods or their value. This was always the rule at common law, and it is apprehended that the Infants' Relief Act, 1874 (*b*), makes no difference in this respect; the enactment that all contracts for goods supplied to infants which were theretofore by law voidable should be void, presumably merely meant that they should be incapable of ratification, and not that the party contracting with the infant should be entitled to treat the contract as a nullity.

Moreover, in spite of the general rule of law that an infant is not liable, apart from deceit, for a misrepresentation that he was *sui juris*, whereby a party was induced to contract with him (*c*), it has been held that if the infant, at the time of obtaining the goods, was actually guilty of fraud in concealing his minority, the vendor may rescind the contract, and as the infant would no longer hold the goods under the contract the vendor may recover them in trover (*d*). But if before discovery of the fraud the infant has parted with the goods for value, it is then too late to rescind, and the vendor is without remedy; he cannot sue in deceit for damages, for that would be in substance a means of enforcing the contract to pay the price (*e*).

Where goods have been delivered to an infant under a contract

(*a*) See Ch. XV., and cases there cited.

(*b*) 37 & 38 Vict. c. 62.

(*c*) *Liverpool Adelphi Loan Association* v. *Fairhurst and Wife*, (1854) 9 Ex. 422.

(*d*) *Mills* v. *Graham*, (1804) B. & P. 1 N. R. 140.

(*e*) *Johnson* v. *Pye*, (1665) 1 Sid. 258; *Price* v. *Hewett*, (1852) 8 Ex. 146.

of bailment, the bailor, in the absence of any fraudulent concealment of the infancy, cannot bring trover to recover the goods so long as the agreed term of bailment continues. But as soon as the bailment has ceased (*a*), either by effluxion of time, or by some act on the part of the infant, so inconsistent with the terms of the bailment as to entitle the bailor to treat it as determined, as, for instance, where the infant pledges the goods, the bailor may sue for the goods or their value.

When in trespass.

An infant bailee may be sued for any independent trespass committed by him to the goods bailed. Whether in any particular case an improper dealing by the infant with the goods bailed to him is a mere breach of the contract or amounts to an independent tort it is not always easy to determine. It has been held that if an infant hire a horse, the riding of the horse for an improper distance is a mere excess of the hirer's rights under the contract, and if the horse be thereby injured he will not be liable (*b*); but if he jump the horse knowing it to be in an unfit condition to be jumped and being expressly prohibited from jumping it, that is an independent tort for which he will be liable (*c*). The question whether in such cases the wrongful act is a mere excess or outside the contract altogether, is one of degree.

Injury to infant *en ventre sa mère.*

Agreement to settle action voidable.

An action for personal injuries will not lie at the suit of an infant which was *en ventre sa mère* at the time of the accident (*d*). But an acceptance by an infant of a lump sum down as settlement in full of an action already commenced by the infant's guardian *ad litem* constitutes no bar to the proceedings (*e*).

Lunatics.

There is no reported instance of an action of tort ever having been brought in this country against a lunatic, but it is apprehended that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons. If a lunatic commit a trespass while in a state of frenzy he will not be liable any more than a sane person who

(*a*) See *per* Cave, J., in *Reg.* v. *McDonald*, (1885) 15 Q. B. D. p. 325.

(*b*) *Jennings* v. *Rundall*, (1799) 8 T. R. 335.

(*c*) *Burnard* v. *Haggis*, (1863) 14 C. B. N. S. 45.

(*d*) *Walker* v. *Great Northern R. Co. of Ireland*, (1890–1) 28 L. R. Ir. 69.

(*e*) *Mattei* v. *Vautro*, (1898) 78 L. T. 682.

does a similar act while under the influence of sudden terror which deprives him of all power of deliberate choice; but subject to that exception the defendant's lunacy will be no answer to an action of trespass, for he is capable of intending the physical act which he does (*a*). Whether a lunatic can be sued for a libel would seem to depend upon the question whether he was insane upon the subject to which the libel related; if he was, then presumably he would not be liable, for liability in libel depends upon a consciousness that the matter published is defamatory; but if he was sane on that subject, then, although insane on other subjects, he ought to be held answerable in damages (*b*). But there is no authority on the point to be found in the books.

The liability of a lunatic in an action for negligence seems to stand on the same footing as the liability of a young child in a similar action, that is to say, it is a question for the jury whether he was sufficiently self-possessed to be capable of taking care.

Husband when liable for wife's torts.

By the common law a married woman could not either sue or be sued unless her husband were joined with her as plaintiff or defendant, but now by the Married Women's Property Acts, 1882 and 1893, she may both sue and be sued in tort in all respects as if she were a *feme sole*, and any damages or costs recovered by her in any such action shall be her separate property, and any damages or costs recovered against her shall be payable out of her separate property (*c*). For torts committed by a woman before her marriage her husband was formerly liable to the full extent of the damages recovered, but now by the above Act his liability is limited to the extent of the property acquired by him through his wife (*d*). But for the wife's torts committed

(*a*) In *Weaver* v. *Ward*, (1616) Hob. 134, it is said without qualification that "if a lunatic hurt a man he shall answer in trespass," but this proposition would appear too wide.

In *Krom* v. *Schoonmaker*, (1848) 3 Barb. 647, it was decided in the Supreme Court of the United States that an action of false imprisonment lay against a lunatic who in his capacity of justice of the peace caused the plaintiff to be wrongfully imprisoned; but it is presumed that the extent of the insanity in that case was not great.

(*b*) See Ch. XVII.

(*c*) 45 & 46 Vict. c. 75, s. 1; 56 & 57 Vict. c. 63, s. 1. The Act of 1893 extends the liability of married women for costs of litigation to separate estate restrained from anticipation.

(*d*) ss. 14, 15.

during coverture the husband's liability continues to be unlimited (*a*). And as the old common law action against the husband and wife jointly in respect of the torts of the wife still exists, there cannot be separate judgments with regard to the husband and wife. Consequently a payment into Court by the husband in satisfaction of the claim, coupled with a denial of liability by the wife, is not an admissible method of pleading (*b*). The reason why a husband was liable at common law for his wife's antenuptial and postnuptial torts was simply that during coverture she could not be sued without him (*c*). Therefore, as soon as the coverture comes to an end by divorce (*d*), or by the wife's death (*e*), the husband's liability ceases, even though an action to establish it may have already been commenced. It has also been expressly provided by statute that for torts committed by a wife while separated from her husband under a judicial separation he shall not be liable (*f*), but whether a decree of judicial separation has, like a divorce, the effect of causing a vested right of action to abate does not seem clear. A husband remains liable for his wife's torts committed during coverture although living apart from him under a voluntary separation (*g*), and probably also during the currency of a decree *nisi* (*h*).

It is, however, submitted, though there is apparently no direct authority to support the proposition, that the commission of a marital offence by a wife living, by agreement, apart from her husband should avoid the husband's liability for a tort committed by her, subsequently to the adultery.

In *Wainford* v. *Heyl* (*i*), Jessel, M.R., took a different view as to the ground of a husband's common law liability for his wife's torts; he said, "Strictly speaking, she cannot commit torts; they are the torts of her husband, and therefore she creates as against her husband a liability;" but this view seems irre-

(*a*) *Seroka* v. *Kattenburg*, (1886) 17 Q. B. D. 177; and see *Earle* v. *Kingscote*, (1900) 1 Ch. 203.

(*b*) *Beaumont* v. *Kaye*, (1904) 1 K. B. 292, C. A.

(*c*) *Per* Erle, C.J., (1864) 17 C. B. N. S. p 748.

(*d*) *Capel* v. *Powell*, (1864) 17 C. B. N. S. p. 743.

(*e*) *Per* Willes, J., *Wright* v. *Leonard*, (1861) 11 C. B. N. S. p. 266.

(*f*) 20 & 21 Vict. c. 85, s. 26.

(*g*) *Head* v. *Briscoe*, (1833) 5 C. & P. 484.

(*h*) *Norman* v. *Villars*, (1877) 2 Ex. D. 359.

(*i*) (1875) L. R. 20 Eq. p. 324.

concilable with the judgments in *Capel* v. *Powell* (*a*), for if it were sound the husband's liability for his wife's tort ought to survive notwithstanding the determination of the coverture, which it does not.

Wife may sue husband for tort to her separate property.

A wife may sue her husband for a tort to her separate property (*b*), but he has apparently no corresponding right of action against her for torts to his property. Neither husband nor wife can sue the other for any tort of any other kind (*c*).

Personal representatives.

It was a general principle of the common law that actions of tort died with the person, whether the person so dying was the party injured or the tort-feasor (*d*). At common law the personal representatives of a deceased person could never sue in respect of torts committed in his lifetime to his person or his property, and with two exceptions they could never be sued for torts committed by him. But by the statute 4 Edw. III. c. 7, executors were enabled to sue for any injuries to the personal estate of their testator for which he might have sued if he were living, and this remedy has been extended by the Courts to administrators. The statute 15 Edw. III. c. 5, gives a like remedy to the executors of executors. The former statute speaks only of trespasses, but this term includes all injuries whereby the personal estate has directly been rendered less beneficial (*e*). Slander of title to a trade mark is an injury of this nature, and the action for it will survive to the executors of the party slandered (*f*). Where one person wrongfully digs and removes the coal or minerals of another person, the owner may waive the trespass to the realty and sue in trover for the coals or minerals as chattels (*g*), consequently executors may sue for the value of any minerals wrongfully dug and carried away during their testator's lifetime, although the wrongful act was committed more than six months (*h*) before the testator's death, for they

1. Remedies survive for torts to personal estate of deceased.

(*a*) (1864) 17 C. B. N. S. 743.

(*b*) 45 & 46 Vict. c. 75, s. 12.

(*c*) *Ibid.*

(*d*) The clause usually inserted in an order of reference to arbitration, to the effect that in case of death of either party before making the award it shall be delivered to their personal representatives, is inoperative where the action is for a tort (*Bowker* v. *Evans*, (1885) 15 Q. B. D. 565).

(*e*) Williams on Execu'ors, Pt. ii. Bk. iii. Ch. i. § i.

(*f*) *Hatchard* v. *Mège*, (1887) 18 Q. B. D. 771.

(*g*) See below, p. 358.

(*h*) Which is the limitation for injury to real estate. See below, p. 52.

may treat it as an injury to his personal estate under the statute of Edw. III. Anything which having formed part of or been attached to the freehold of an owner in fee or other person not impeachable of waste is severed from the freehold, becomes from the moment of severance part of the owner's personal estate, and for the removal of it or any injury to it after severance the cause of action passes to the executor. Thus, an executor may sue in trover for trees wrongfully cut down by a stranger in the testator's lifetime (*a*).

But where a testator sustains personal injuries from a tortious act, and in consequence is prevented from earning his livelihood and is put to expense in obtaining medical attendance, such special damage does not constitute an injury to his personal estate which will pass to the executor (*b*). But on the other hand where similar actions were brought by the executrices of persons who while travelling as passengers on the defendants' lines were injured in railway accidents, it was held that they might recover for medical expenses and for loss occasioned by the inability of the deceased persons to attend to their business, on the ground that the maxim *actio personalis moritur cum personâ*, never applied to damage to the deceased's estate when such damage was caused by breach of contract (*c*). The Statute of Limitations will run as against executors and administrators from the date of the accrual of the cause of action to the deceased.

2. For torts to real estate committed within six months before death.

By 3 & 4 Will. IV. c. 42, s. 2, it is provided that the personal representatives of a deceased person may within twelve months after his death maintain an action for any injury to his real estate committed in his lifetime, and not more than six months before his death.

3. Actions under Lord Campbell's Act.

The only cases in which an action for injuries to the person survives the death of the party injured are those provided by

(*a*) *Williams* v. *Breedon*, (1798) 1 B. & P. 329. The decision in *Emerson* v. *Emerson*, (1672) Ventr. 187, to the effect that the executor could not sue for the wrongful cutting and asportation of growing grass in the testator's lifetime, turned merely upon a point of pleading.

(*b*) *Pulling* v. *Great Eastern R. Co.*, (1882) 9 Q. B. D. 110. In this case the deceased, who was not a passenger on the defendant's line, was run over by one of their trains while he was crossing the railway at a level crossing, so that the damages sought to be recovered were the result of a pure tort.

(*c*) *Bradshaw* v. *Lancashire & Yorkshire R. Co.*, (1875) L. R. C. P. 189; *Daly* v. *Dublin, Wicklow & Wexford R. Co.*, (1892) 30 L. R. Ir. 514.

the Workmen's Compensation Acts, 1897 and 1900 (*a*); by the Employers' Liability Act, 1880; and by Lord Campbell's Act, 9 & 10 Vict. c. 93, which enacts that "whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (*b*).

"Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct" (*c*).

"Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person" (*d*).

If no such action is brought by the executor or administrator within six months after the death, then the action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought in the name of the executor or administrator, or if, as would usually be the case with poor persons, there is no executor or administrator, then the persons for whose benefit the action would have been brought, if there had been an executor or administrator to bring it, may sue at once (*e*).

(*a*) See *post*, p. 95.
(*b*) s. 1.
(*c*) s. 2.
(*d*) s. 3.
(*e*) 27 & 28 Vict. c. 95, s. 1.

The cause of action which Lord Campbell's Act thus gives to the personal representatives differs from the cause of action which the deceased would have had if he had survived in this, that the remedy is given for the benefit of the members of the family not as a class but as individuals; and, therefore, on the death of a person whose income arose solely from land or other invested capital, no portion of which was lost to his family by his death, the action is maintainable if in consequence of that death the mode of its distribution among the members is changed, as where the bulk of the property is settled on the eldest son (*a*). But on the other hand the causes of action are the same to this extent, and if the deceased in his lifetime accepted any compensation in satisfaction of his claims against the defendant, the personal representatives are debarred from bringing any action under the statute (*b*); and, similarly, if the deceased, being a workman, contracted with his employer not to claim compensation under the Employers' Liability Act for personal injuries caused by the negligence of his fellow-workmen, and he died from injuries so caused, his personal representatives are bound by his contract and cannot sue (*c*).

Workmen's Compensation Act, s. 9.

It is, however, now provided by s. 9 of the Workmen's Compensation Act, 1897, that, "Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act" (*d*).

For injuries done to the personal property of the deceased after his death the executor or administrator can sue, whether the injury was prior to the grant of probate or letters of administration or not, provided in the case of an executor that he have obtained probate before production of the probate

(*a*) *Pym* v. *Great Northern R. Co.*, (1863) 4 B. & S. 396.

(*b*) *Read* v. *Great Eastern R. Co.*, 1868) L. R. 3 Q. B. 555.

(*c*) *Griffiths* v. *Earl of Dudley*, (1882) 9 Q. B. D. 357.

(*d*) This Act came into operation on July 1st, 1898.

becomes necessary (*a*), and in the case of an administrator that he have obtained letters before commencing the action (*b*). The title of executor (*c*), or administrator (*d*) when once probate or letters have been granted relates back to the date of the death, and any injury committed subsequently thereto is an injury to them.

4. Personal representatives may be sued for value of property wrongfully added by deceased to his estate.

There are three cases in which the personal representatives of a deceased may be sued for torts committed by him. The first is where he has wrongfully appropriated the property of another person and added such property or its proceeds to his own estate. But to bring a case within this exception to the general rule it is not enough that the estate of the deceased should have indirectly benefited by his tortious act; the benefit must consist in the direct acquisition of property or its proceeds. Thus if a person trespass on the land of his neighbour, and wrongfully use the roads and passages on such land for the conveyance of his own minerals, although his personal estate may have derived indirect benefit from such user the remedy for the trespass dies with the person (*e*). If a tenant for life "has wrongfully cut timber, the timber or its proceeds or value can be followed. But no action for waste, permissive or voluntary, as such lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up an ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognise in this indirect benefit which he may have received any ground for proceedings against his executors" (*f*).

5. Representatives of beneficed clerk may be sued for dilapidations.

An action of tort lay at common law against the executors of a beneficed clerk at the suit of his successor for dilapidations of the building upon his benefice. For such remedy there has now been substituted by statute (*g*) an action of debt.

(*a*) Williams on Executors, Pt. i. Bk. iv. Ch. i. § ii.

(*b*) *Martin* v. *Fuller*, (1696) Comb. 371.

(*c*) 1 Rolle, Abr. 917, A. 2.

(*d*) *Tharpe* v. *Stallwood*, (1843) 5 M. & G. 760.

(*e*) *Phillips* v. *Homfray*, (1883) 24 Ch. D. 439.

(*f*) *Per* Bowen, L.J., *Phillips* v. *Homfray*, (1883) 24 C. D. p. 455.

(*g*) 34 & 35 Vict. c. 43; as to which see below, p. 378.

6. For torts to property committed by deceased within six months before death liability survives.

A third exception to the general rule is created by statute 3 & 4 Will. IV. c. 42, s. 2, which provides that an action may be brought against the executors or administrators of any person deceased for any injury committed by him in his lifetime to the real or personal property of another, if the injury was committed within six months of his death, and provided the action be brought within six months after the executors or administrators shall have taken upon themselves the administration of the deceased person's estate.

Assignees.

The question whether a right of action for a tort is assignable so as to entitle the assignee to sue in his own name, although always highly problematical, was not at one time the subject of an actual decision. It has, however, been held in recent cases, that the assignment of a mere right of litigation, such as accrues in the case of a legal claim to recover damages arising out of an assault, is not admissible, presumably upon the ground that such assignments would materially affect the existing laws against champerty and maintenance (*a*).

No doubt s. 25 of the Judicature Act, 1873, which enacts, that "any absolute assignment by writing . . . of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action," shall be effectual to transfer the legal right to such debt or chose in action, will include the assignment of a claim for compensation for damage resulting from the lawful exercise of statutory powers (*b*). But there are two objections in the way of holding that that section authorises the legal transfer of a right of action in tort. In the first place, although a right of action in tort is a chose in action in the widest sense of that term (*c*), the words "or other legal chose in action" seem to point to something *ejusdem generis* with debts, *i.e.*, causes of action arising out of contract. And secondly, as the Judicature Act is a

(*a*) *May* v. *Lane*, (1894) 64 L. J. Q. B. 237, C. A.; *Dawson* v. *Great Northern and City R.*, (1905) 1 K. B. 260 at p. 270, C. A.; but see *contrà Trail & Sons* v. *Actieselskabat Dalbeattie, Ltd.*, (1904) 6 F. 798, Ct. of Sess.

(*b*) *Dawson* v. *Great Northern and City R.*, (1905) 1 K. B 260, C. A.

(*c*) Termes de la Ley.

mere statute of procedure, it was not intended to affect the rights of parties (*a*). This section cannot therefore be regarded as making that assignable in law which was not assignable in equity before, but only as enabling an assignee to sue in his own name in cases in which before the Act he could have sued in the name of his assignor. This view is supported by the decision of Wright, J., in the recent case of *Dawson* v. *Great Northern and City R. Co.* (*b*), in which it was held that a right to sue for damages in tort is not a legal chose in action within the meaning of s. 25 of the Judicature Act, 1873. There seems indeed to be but little authority in this country for the general proposition, that an assignee of a right of action in tort can sue either in his own name or in that of his assignor (*c*). It was, however, held in the *Park Gate Waggon Works Co., In re* (*d*), that claims against the directors of an insolvent company for misfeasance were capable of assignment by the official liquidators to a third party, under s. 95, subs. 3, of the Companies Act, 1862. In the case of *Cohen* v. *Mitchell* (*e*), where a cause of action for the conversion of goods was assigned, and the action was carried on in the name of the assignor, the judgment of the Court of Appeal involved the assumption that the assignment was good; but the point was not argued, and no decision was given upon it. In *Williams* v. *Protheroe* (*f*) the

Whether cause of action in tort assignable.

(*a*) See *per* Lord Herschell, *British South Africa Co.* v. *Companhia de Moçambique*, (1893) A. C. p. 628.

(*b*) (1904) 1 K. B. 277; this case was subsequently reversed by the Court of Appeal on another point, (1905) 1 K. B. 260.

(*c*) But see *Trail & Sons* v. *Actieselskabet Dalbeattie, Ltd.*, (1904) 6 F. 798, Ct. of Sess.

(*d*) (1881) 17 Ch. D. 234, C. A.; and see *Gibbon* v. *Dudgeon*, (1881) 45 J. P. 748. The doctrine of "subrogation" appears to be recognised in colonial legislation. See *Victoria Insurance Co.* v. *King*, (1895) Queensland L.J. Reports, vol. vi. p. 202; affirmed, (1896) A. C. 250.

(*e*) (1890) 25 Q. B. D. 262. Whether the goods in that case had been converted into money by the defendant, or still remained in his possession, did not appear. It may be that where goods have been wrongfully seized and converted by the defendant into money the cause of action may be assigned, for the plaintiff may waive the tort and sue on an implied *assumpsit* for money had and received to his use. But where the goods remain unsold in the defendant's hands, it is apprehended that the cause of action cannot be assigned. The plaintiff may indeed assign the goods, and then upon a fresh demand and refusal after the assignment the assignee may bring trover. But that was not the case in *Cohen* v. *Mitchell*. The cause of action there assigned was one in respect of which the action had been commenced before the date of the assignment.

(*f*) (1829) 5 Bing. 309.

Court are reported to have said that there is no objection to the validity of an agreement by the vendor of an estate that the purchaser should be entitled to sue in the vendor's name for "injuries done to it previously to the purchase;" but on reference to the facts of the case, it appears that the action to which the agreement related was an action against a tenant for dilapidations arising from non-repair, which was a mere breach of contract, and actions upon contracts have always been assignable in equity (*a*). That case is therefore no authority for saying that a cause of action for active injury would be assignable. In *De Hoghton* v. *Money* (*b*), Turner, L.J., said that "a right to complain of a fraud is not a marketable commodity," and the same view has been expressed by Lord Abinger in *Prosser* v. *Edmonds* (*c*). But if a right of action for fraud is not assignable, then neither ought a right of action for any other tort to be so.

There seems, indeed, to be no valid reason in principle for any distinction as regards their assignability between rights of action for torts to property, and rights of action for torts to the person or reputation. The reason given by Lord Abinger in *Howard* v. *Crowther* (*d*) for holding that actions for torts of the latter class do not pass to trustees in bankruptcy, while those for torts of the former class do, namely, that in actions of the latter class the trustees would get no sufficient damages, has no application to the case of assignment of such rights of action by a solvent assignor. In the case of bankruptcy it would be unjust for the law to compulsorily deprive the injured person of a substantial claim for damages, unless by so doing it conferred a corresponding benefit upon the creditors; but in the case of a voluntary assignment by the injured person, the fact that the assignee will get but little damages, though it may present a formidable difficulty in the way of finding a purchaser, can, apart from the encouragement it would give to champertous actions, afford no good reason why the injured person should not sell his cause of action for

(*a*) And see *Tolhurst* v. *Associated Portland Cement Manufacturers and Others*, (1903) A. C. 414.

(*b*) (1866) L. R. 2 Ch. 164.

(*c*) (1835) 1 Y. & C. 481.

(*d*) (1841) 8 M. & W. 601. "How can they" (the trustees), he said, at p. 603, "represent his aggravated feelings?"

what it will fetch if he likes. And yet if a right of action for a purely personal tort were assignable, this strange result would follow, that the assignee would have only a cause of action determinable upon the death of another person by reason of the maxim *actio personalis moritur cum personâ*. But such a limitation has never been heard of. It is apprehended that actions for purely personal torts are not assignable, and consequently if they are not, neither are actions for torts to property (*a*), even though they purport to be assigned along with the injured property itself.

Assuming, however, that rights of action in tort are in general not assignable, there are two exceptions to that rule: first, a chose in action may be assigned to the Crown (*b*); and, secondly, rights of action of any kind which pass to a trustee in bankruptcy (including rights of actions for torts to the debtor's property) are, it appears, assignable by the trustee to a stranger (*c*). But as the objection to the purchase of a cause of action on the score of champerty must be wholly independent of the character of the vendor, this case may be difficult to reconcile with other authorities.

Corporations not liable for torts outside of scope of corporate powers.

Corporations are liable to be sued for torts of all kinds committed by their agents (*d*), to the same extent to which an individual is liable for the torts of his agent, provided that the act or class of acts, in the course of the doing of which the torts are committed, are within the scope of the corporate powers (*e*).

(*a*) See *per* Wright, J. in *Dawson* v. *Great Northern and City R. Co.*, (1904) 1 K. B. 277, and Park, J. in *Stanley* v. *Jones*, (1831) 7 Bing., p. 375, *arguendo* seems to have suggested otherwise—*sed quære?*

(*b*) Co. Litt. 232 b, Hargrave and Butler's note.

(*c*) *Secar* v. *Lawson*, (1880) 15 Ch. D. 426. There the action was in the name of the trustee. *Quære* whether the assignee could have sued in his own name. The distinction between the right of an assignee to sue in his own name and his right to sue in the name of the assignor may be very material. See on this point *Western Bank of Scotland* v. *Addie*, (1867) L. R. 1 H. L. Sco. Ap. 145, at p. 166.

(*d*) Where the Corporation is a local authority an action for damages must be commenced within six months (*Casey* v. *Bermondsey Borough Council*, (1903) 20 T. L. R. 2).

(*e*) To fix a corporation with liability for the acts of its agents, two conditions must be fulfilled; 1st, the act must have been within the scope of the agent's employment; 2nd, that employment must have been within the scope of the corporate powers. As to the former, see below, pp. 75 *sqq*.

What classes of acts are within the scope of the powers of a particular corporation, and what are without it, it is frequently a matter of very great difficulty to determine. At what point a tortious act ceases to be a mere excess in the exercise of the corporate powers, and becomes something altogether outside the scope of those powers, is necessarily a question of degree; just as, in the analogous case of principal and agent, it is a question of degree whether a particular class of acts is within or without the scope of the agent's employment (*a*).

In *Poulton* v. *London and South Western R. Co.* (*b*) not only was it held that no authority was to be implied from a railway company to its station-master to apprehend a person travelling on their railway for non-payment of the carriage of goods, but Blackburn, J., went further and expressed an opinion that the apprehension of a person for such a reason was outside the scope of the corporate powers, and that consequently even if the station-master had been given express authority to arrest under such circumstances, the company would not have been liable (*c*). In *Mill* v. *Hawker* (*d*) a resolution passed by a highway board, directing their surveyor to remove an obstruction placed across a path alleged to be a public highway, was held by Pigott and Cleasby, BB., Kelly, C.B., dissenting, to be outside the scope of the board's corporate powers. This case afterwards went to the Exchequer Chamber (*e*), but no decision was given on this point, though the members of the Court intimated that there was considerable difference of opinion between them upon it.

Torts within scope of corporate powers.

But assuming that the business, in the course of which the tort is committed by the agent, is within the scope of the corporate powers, as well as within the scope of the agent's employment, it matters not what the nature of the tort is, the corporation will be liable even though it be one involving fraud (*f*) or malice (*g*). It was formerly thought that a corporation, being

(*a*) See *Ruben and Another* v. *Great Fingall Consolidated and Others*, (1904) 2 K. B. 712.
(*b*) (1867) L. R. 2 Q. B. 534.
(*c*) p. 540.
(*d*) (1874) L. R. 9 Ex. 309.
(*e*) (1875) L. R. 10 Ex. 92.
(*f*) *Barwick* v. *English Joint Stock Bank*, 1867) L. R. 2 Ex. 259.
(*g*) *Citizens' Life Assurance Co.* v. *Brown*, (1904) A. C. 423; *Whitfield* v. *South Eastern R. Co.*, (1858) E. B. & E.

incapable in its corporate character of a malicious intention, could not be liable to an action in which it was necessary to prove actual malice, such as an action for malicious prosecution (*a*), or for libel published on a privileged occasion, or for slander of title, but the better and indeed conclusive opinion at the present day is that it can (*b*); it having been decided by the Judicial Committee of the Privy Council in the recent case of *The Citizens' Life Assurance* v. *Brown*, that a corporation is liable to an action for malicious libel, when such libel was published by its servant acting in the course of his employment. And this rule applies even though the servant may have had no actual authority, either express or implied, to issue the libel complained of (*c*).

To the general rule, however, that corporations may be liable to be sued for torts of all kinds there is possibly one exception; it may be that a corporation practically cannot be held responsible

115; *Green* v. *London General Omnibus Co.*, (1859) 7 C. B. N. S. 290; *Edwards* v. *Midland R. Co.*, (1880) 6 Q. B. D. 287.

(*a*) *Stevens* v. *Midland Counties R. Co.*, (1854) 10 Ex. 352.

(*b*) *Cornford* v. *Carlton Bank*, (1900) 1 Q. B. 23, C. A. It is true that the point was not expressly decided by the Court of Appeal in that case, the decision in *Cornford* v. *Carlton Bank* turning on another point. And in *Netill* v. *Fine Arts and General Insurance Co.*, (1895) 2 Q. B. 156, where the action was for a libel published on a privileged occasion, but there was no evidence of actual malice on the part of the agent who published it, the Court of Appeal left open the question whether, if such actual malice on the part of the agent had been proved, that would have been sufficient to charge the corporation. On the other hand, in *Edwards* v. *Midland R. Co.*, (1880) 6 Q. B. D. 287, Fry, J., refused to follow *Stevens* v. *Midland Counties R. Co.*, (1854) 10 Ex. 352, and held that an action for malicious prosecution would lie against a corporation; and in *Bank of New South Wales* v. *Owston*, (1879) 4 App. Cas. 270, which was also an action for malicious prosecution, counsel of the highest eminence abandoned the old doctrine as untenable. Moreover, if the decision in *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259, that a corporation may be responsible for the fraud of their agent, was correct, as Lord Selborne in *Houldsworth* v. *City of Glasgow Bank*, (1880) 5 App. Cas. p. 326, conceded, it is difficult to see how any different view could prevail in the case of an action founded upon malice. For fraud is just as much a state of mind as is malice. The real reason why a corporation is responsible for the fraud of its agent is not that the fraud is imputable to the corporation itself, for that it cannot be; it rests simply on the principle of *respondeat superior*. "It is," as Lord Selborne said in *Houldsworth Case* (p. 326), "a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual." And the same principle must equally apply to malicious wrongs.

(*c*) (1904) A. C. 423; disapproving *Abrath* v. *North Eastern R.*, (1883–6) 11 App. Cas. 247.

for a fraudulent misrepresentation as to the credit of a third person, owing to the difficulty of complying with the terms of Lord Tenterden's Act, which requires that the representation should be in writing, *personally* signed by the party to be charged (*a*).

Where corporation liable for torts of corporators.

But although a tort committed by an agent in the course of a business within the scope of the corporate powers will render the corporation responsible, a similar act done not by an agent but by the corporators themselves will not necessarily render the corporation liable. For on the one hand the sum of the individual corporators, even when acting in a matter within the corporate powers, is not identical with the corporation itself, nor on the other hand do they stand to the corporation in the same relation as an ordinary agent stands to his principal. If an ordinary agent commits a tort of such a kind as to render his principal liable, the agent will be liable also; their liabilities are cumulative. But it is otherwise with torts committed directly by corporators: their liability and that of their corporation is in the alternative; they cannot both be liable (*b*).

And if a plaintiff elect to sue the agent and not the corporation, he must abide by such election, and is estopped from afterwards suing the corporation in respect of the same matter (*c*).

If the corporators, acting in their corporate capacity in a matter within the scope of their corporate powers, under a *bonâ fide* mistake of fact order an act to be done which turns out to be tortious, the corporation will be liable and the corporators will not (*d*). But if the corporators commit a wilful tort, whether fraudulent or malicious, as for instance where they publish a

(*a*) See this subject discussed below, in Ch. XVI. In *Houldsworth* v. *City of Glasgow Bank*, (1880) 5 App. Cas. p. 340, Lord Blackburn treated it as an open question, whether an action of deceit could be brought against a company under any circumstances for damage caused by fraud of the directors, inducing the plaintiff to enter into a contract with the company, while the contract remained unrescinded, but the other law lords do not seem to have assented to this view.

(*b*) *Harman* v. *Tappenden*, (1801) 1 East, 555; *Rex* v. *Windham*, *ibid.*, cited by Lord Kenyon, p. 561; *Mill* v. *Hawker*, (1874) L. R. 9 Ex. 309.

(*c*) *Cross & Co.* v. *Matthews and Wallace*, (1904) 91 L. T. 500.

(*d*) *Per* Kelly, C.B., *Mill* v. *Hawker*, (1874) L. R. 9 Ex. p. 322. This was not disputed by the other members of the Court.

libel knowing it to be such (*a*), inasmuch as it would be unjust that they should escape liability by purporting to do it under the cloak of their corporate character, they must be held liable, from which it follows that the corporation will not be so. And this rule will presumably hold good even though the corporators may commit the tort, not for their own private ends, but with the object of furthering the interests of the corporation.

Corporation in general liable for torts to its own corporators.

As a general rule a corporation is liable to its own corporators for the torts of its agents to the same extent as it is liable to strangers; it is of course no defence to an action against a railway company for personal injuries to plead that the plaintiff was a shareholder. But to this rule there is an exception; an action of deceit will not lie against a company at the suit of a shareholder, while the contract of partnership remains unrescinded, for damage caused by the fraud of the directors in inducing him to take shares (*b*). But it is apprehended that this exception does not extend to the case of fraud inducing a contract, between the corporator and the corporation, of any other description than that of a contract to take shares. The fact that the plaintiff in such case may have to contribute rateably towards the payment of his own claim will not affect the validity of his claim (*c*).

Joint tort-feasors: extent of their liability.

Where several persons join in committing a tort, "each is responsible for the injury sustained by their common act" (*d*). If one of several joint tort-feasors be sued alone it matters not that he did but a small part of the damage, he is liable for the whole. Where a tort is joint there can be only one action, a recovery of judgment against one of the several wrong-doers being a bar to any further action against the others (*e*). It is material, therefore, to enquire under what circumstances a tort can be said to be joint.

Definition of joint tort-feasor.

Persons are said to be joint tort-feasors when their respective

(*a*) *Rex* v. *Watson*, (1788) 2 T. R. 199.

(*b*) *Houldsworth* v. *City of Glasgow Bank*, (1880) 5 App. Cas. 317. See in this connection certain *dicta* of Lord Cottenham in *Vigers* v. *Pike*, (1842) 8 Cl. & Fin. 562, at pp. 646 to 649.

(*c*) See *per* Lord Selborne in *Houldsworth* v. *City of Glasgow Bank*, (1880) 5 App. Cas. p. 329.

(*d*) *Per* Rolfe, B., *Clark* v. *Newsam*, (1847) 1 Ex. p. 140; *Mileham* v. *Corporation of Marylebone*, (1903) 67 J. P. 110.

(*e*) *Brinsmead* v. *Harrison*, (1871-2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

shares in the commission of the tort are done in furtherance of a common design. "All persons in trespass who aid or counsel, direct, or join, are joint trespassers" (*a*). If one person employs another to commit a tort on his behalf, the principal and the agent are joint tort-feasors, and recovery of judgment against the principal is a bar to an action against the agent (*b*). But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end. In one case, indeed, Lord Ellenborough, at *nisi prius*, ruled that where a huntsman rode after his hounds over the plaintiff's lands, he was liable for the whole damage done by the concourse of people who followed him, on the ground that the parties were co-trespassers (*c*). The ruling can hardly be supported on that ground, for it seems to be based on a mistaken notion as to the object of fox-hunting, though it may possibly be supported on the principle of *Clark* v. *Chambers* (*d*), that a person who does an unlawful act, the probable consequence of which is that third persons will negligently do something injurious to the plaintiff, is liable to the plaintiff for the injury done by such third persons. It must not be inferred from Lord Ellenborough's ruling that wherever persons independently commit similar trespasses at the same time in the same place, they are co-trespassers within the meaning of the rule. Indeed it has been expressly held that one member of a hunt, not being the master or huntsman, is not liable for damage done by the horses of the other members of the hunt (*e*).

Whether the several persons who join in the unauthorised performance of a play are joint tort-feasors, so that recovery of judgment against one for the 40*s*. penalty given by 3 & 4 Will. IV. c. 15, discharges the others, was left open by the Court of Appeal in *Duck* v. *Mayeu* (*f*). But probably all that the Court meant was, that they doubted whether the 40*s*. was given as damages by way of compensation, or whether it was inflicted as a penalty

(*a*) *Per* Tindal, C.J., *Petrie* v. *Lamont*, (1842) Car. & Marsh. p. 96.

(*b*) *Brinsmead* v. *Harrison*, (1871-2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

(*c*) *Hume* v. *Oldacre*, (1816) 1 Stark. p. 352.

(*d*) (1878) 3 Q. B. D. 327. See below, pp. 144–145.

(*e*) *Paget* v. *Birkbeck*, (1863) 3 F. & F. 683.

(*f*) (1892) 2 Q. B. 511.

in the strict sense of the term, in which case the unauthorised performance could not strictly be regarded as a tort at all (*a*).

The independent tortious acts of several persons, even though contributing to produce but one joint damage, will not constitute a joint tort. Thus, if a person wrongfully leave unfenced a pit, which he has dug by the side of a high road, and another wrongfully does some act in the road whereby horses passing along it take fright and swerve into the pit, or if one person negligently allows an escape of gas which another person negligently causes to explode by taking a lighted candle into the room, though each party will be liable for the whole damage done, they will not be joint tort-feasors.

Thus in *Thompson* v. *London County Council* (*b*) where the plaintiff having brought an action against the defendants for excavating near his house and withdrawing the support, whereby it was damaged, sought to add a water company as co-defendants upon the ground that they contributed to the damage by negligently allowing water to escape from their main, the Court refused to allow the water company to be joined, being of opinion that the facts did not constitute a joint tort. So, where two railway companies, which had parcel offices on opposite sides of the plaintiff's shop, caused their carts to stand in the street in front of their respective offices for an unreasonable length of time, and by their combined acts in so doing prevented all access to the plaintiff's premises by vehicles and thereby injured him in his trade, though the acts of either company alone would not have had that effect, it was held that the two companies could not be made co-defendants in an action to recover damages for the obstruction, but that each must be sued separately (*c*).

It is apprehended that torts of all kinds may be joint, and that in this respect libel and slander (*d*) form no exception. If the writer of a libellous paragraph send it to the publisher of a

(*a*) In the earlier case of *Adams* v. *Batley*, (1887) 18 Q. B. D. 625, the Court of Appeal had held that the 40*s.* was in the nature of damages, with the consequence that the plaintiff might administer interrogatories. It may be that the Court in *Duck* v. *Mayeu* doubted the correctness of that decision.

(*b*) (1899) 1 Q. B. 841, C. A.

(*c*) *Sadler* v. *Great Western R. Co.*, (1896) A. C. 450.

(*d*) *E.g.*, a defamatory chorus of a song.

newspaper for insertion, he will be jointly liable with the publisher for its publication in the newspaper, though possibly he may also be severally liable in respect of the publication to the publisher. In an old case (*a*) it was held that slander cannot be joint any more than the tongues of the slanderers can be said to be one, a line of reasoning which would equally prevent the possibility of trespasses being joint.

Contribution between joint tort-feasors.

As a general rule there can be no contribution between joint tort-feasors, that is to say, if an action being brought for a joint tort, and one wrong-doer pay the whole damages recovered, he cannot recover over a proportion of the damages from the others (*b*).

Where several persons combine to do some act which at the time of its commission they know to be unlawful, as where they combine to commit an assault or to publish a libel, no promise of contribution or of indemnity can be implied. For any express promise to pay would be void as founded on an illegal consideration, and for the same reason any promise to be implied from the conduct of the parties would, of course, be equally void. But where the party seeking contribution from the other wrong-doers did not, at the time of doing the act, know it to be unlawful, the objection on the score of illegality does not hold good (*c*). But even in those cases in which the joint wrong-doers did not intend to do anything unlawful, the mere fact that the damages have been levied wholly against one does not of itself give rise to an obligation upon the others to contribute. It might well be considered reasonable that as in the case of joint debtors such an obligation should exist, but it is settled law that it does not. The rule of *Merryweather* v. *Nixan*, which in this respect is anomalous and "does not appear to be founded on any principle of justice, or equity, or even of public policy" (*d*), has been too long the law of the land to be now open to question. In order to give rise to an implied promise of indemnity or con-

(*a*) *Chamberlaine* v. *Willmore*, (1621) Palm. 313.

(*b*) *Merryweather* v. *Nixan*, (1799) 8 T. R. 186.

(*c*) *Adamson* v. *Jarvis*, (1827) 4 Bing. 66; *Betts* v. *Gibbons*, (1834) 2 A. & E. 57; and *per* Lord Herschell in *Palmer* v. *Wick and Pulteney Town Steam Shipping Co.*, (1894) A. C. at p. 324.

(*d*) See *per* Lord Herschell (1894) A. C. at p. 324.

tribution there must be the relationship of principal and agent between the tort-feasors, or, at all events, a request by one party to the other to do the act complained of (*a*).

Upon the rule, however, that there can be no contribution where the party seeking it knew at the time of doing the act that it was unlawful, an exception has been engrafted by the Directors Liability Act, 1890 (53 & 54 Vict. c. 64). By s. 3 of that Act directors, promoters, and persons authorising the issue of a prospectus are to be liable to subscribers for loss sustained by reason of any untrue statement in the prospectus, subject to certain limitations. And by s. 5 every person who "has become liable to make any payment under the provisions of this Act shall be entitled to recover contribution, as in cases of contract, from any other person who if sued separately would have been liable to make the same payment." Persons who fraudulently issue a prospectus which they know to be false are no doubt liable at common law, but that fact does not exclude their being also liable under the provisions of the Act, and they are consequently entitled to the relief afforded by the section (*b*).

Joint plaintiff in tort.

Where a tort was committed to some subject-matter in which several persons were jointly interested, non-joinder of any of the parties so interested as plaintiffs was formerly matter for a plea in abatement, but if no such plea was raised, the parties who sued were entitled to recover damages in proportion to their interests in the subject-matter. Thus one of several joint owners of a chattel might recover for the injury to his share (*c*), leaving his co-owners to recover in another action for the injury to their shares (*d*).

Pleas of abatement are now abolished (*e*), and the present mode of objecting to non-joinder is by application at chambers to have the necessary parties added (*f*), but if no such application be made or, being made, is refused, the old rule will presumably

(*a*) As to the circumstances under which a request will raise an implication of the promise, see *Sheffield Corporation* v. *Barclay*, (1903) 2 K. B. 580 (reversed (1905) A. C. 392) where all the earlier authorities are considered.

(*b*) *Gerson* v. *Simpson*, (1903) 2 K. B. 197.

(*c*) *Bloxam* v. *Hubbard*, (1804) 5 East, 407; *Addison* v. *Overend*, (1796) 6 T. R. 766.

(*d*) *Sedgeworth* v. *Overend*, (1797) 7 T. R. 279. See below, p. 185.

(*e*) Ord. XXI. rule 20.

(*f*) Ord. XVI. rule 11.

still hold good, that the party suing may recover in proportion to his interest and no more.

In the case of libel on a member of a firm there may well be a double injury, one to the reputation of the individual member (*a*), and another to the reputation of the firm (*b*), for which distinct actions will lie; and presumably the individual member, after recovering in an action for the injury to himself personally, may sue alone in a second action for the damage to the firm in respect of his interest in it.

Principal and Agent.

Not only is a person liable for torts committed by himself, but he is also, subject to certain conditions, liable for torts committed by his agents. If indeed the tort of the agent has been either primarily authorised or subsequently ratified by the principal, it is the act of the principal himself, and no difficulty as to his liability arises (*c*). Moreover, under certain circumstances, the principal, whether an individual or a corporate body, will be liable even for the unauthorised torts of his agents (*d*).

Nor will the fact that the act complained of, although within the scope of the agent's employment, was done in the interests of the agent himself and not of his principal exonerate the latter from liability to third parties (*e*).

And this rule applies even in cases where the terms of the written authority under which the agent acted were unknown to the third party at the time when the act complained of was committed (*f*).

Two classes of agents—servants and contractors.

In considering what those circumstances are, which render a principal liable for the unauthorised torts of his agent, it is necessary in the first place to distinguish between those cases in which the principal, by the terms of the employment, express or understood, reserves to himself a power of controlling the agent in the execution of the work that he is employed to do, and of dismissing him for disobedience of orders, and those cases in which

(*a*) *Harrison* v. *Bevington*, (1838) 8 C. & P. 708.

(*b*) *Forster* v. *Lawson*, (1826) 3 Bing. 452.

(*c*) *Carter* v. *St. Mary Abbott's, Kensington*, (1900) 64 J. P. 548, C. A. And see above, p. 60.

(*d*) *Holliday* v. *National Telephone Co.*, (1899) 2 Q. B. 392, C. A.

(*e*) *Hambro* v. *Burnand & Others*, (1904) 2 K. B. 10 C. A.

(*f*) S. C.

the principal does not reserve to himself any such power. Agents of the latter class are generally spoken of as independent contractors; though even when an independent contractor is employed, recent decisions seem to show that a principal cannot always divest himself of responsibility towards third parties by proving, in evidence, that the actual tort-feasor was a person over whom he had reserved no control (*a*).

Those agents of the former class whose employment is more or less continuous are usually styled servants, while those whose employment is intermittent or confined to a particular occasion, are usually called by the generic name of agents. Between servants, however, and other agents over whom the employer reserves control, there is no distinction in point of law; the employer is liable for the torts of the one to the same extent and subject to the same conditions as he is liable for the torts of the other. For the sake of brevity, therefore, it may be convenient to speak of all those classes of agents over whom the employer reserves control under the name of servants, as in contradistinction to contractors over whom such control is not reserved (*b*).

In every case the question whether an agent is employed as a servant or as a contractor is a question of intention, and therefore a question of fact. Where the agent is one "who is recognised by the law as exercising a distinct calling" (*c*) involving for its exercise a certain degree of skill and experience, there is a strong presumption that the employer did not reserve any control over one who presumably knows much better how to do the work than himself, and therefore if one employ a licensed drover to

(*a*) *The Snark*, (1899) P. 74; 80 L. T. 25; *Hill* v. *Tottenham Urban Council*, (1898) 79 L. T. 495; *Mileham* v. *St. Marylebone Borough Council*, (1903) 1 K. G. R. 412.

(*b*) The definition above given of an independent contractor would undoubtedly include a solicitor, for a lay client obviously does not usually reserve to himself any power of controlling the solicitor in the conduct of the business which he is employed to do, and yet it has been held that where a solicitor of a judgment creditor negligently directed the sheriff to take the goods of the wrong person in execution, the client was liable for the act of the solicitor (*Jarmain* v. *Hooper*, (1843) 6 M. & G. 827). But that decision must be regarded as anomalous. If such a question were to arise for the first time at the present day, it would probably be decided otherwise. See the judgment of Jessel, M.R., in *Smith* v. *Keal*, (1882) 9 Q. B. D. 340.

(*c*) *Per* Lord Denman, *Milligan* v. *Wedge*, (1840) 12 A. & E. p. 741.

drive a bullock for him through the streets the drover will not be the servant of the party employing him (*a*), by reason of the contractor, under such or cognate circumstances, choosing alike the method in which the work is to be done and the persons who are to do it; though, as before stated, the mere fact of a principal employing an independent person does not necessarily relieve him from personal liability for the tortious acts of the persons so employed (*b*). Thus if an owner of property employ an independent contractor to rebuild his house, and the builder's workmen so negligently perform their duty as to injure the property of an adjoining owner, the building proprietor, as well as the builder, is responsible to the aggrieved third party for the tortious act (*c*). On the other hand, where the agent is a person not exercising an independent employment, but is directly under the personal control or supervision of his employer, the inference is that he is employed as a servant and not as a contractor, although he may be specially retained as a person skilled in the particular duty or office for which he is engaged. And this presumption is strengthened when from the nature of the employment it may be reasonably supposed that the person employed has no higher degree of skill or experience than the employer, as where an ordinary labourer is employed to clean out a drain, the inference under such circumstances being that he is employed as a servant and not as a contractor (*d*).

Essentials of relationship of master and servant.

To constitute the relationship of master and servant for this purpose there is no necessity for any consideration for the service. If a person employ another to do some act on his behalf gratuitously, as where the owner of a carriage gets a friend to drive it for him (*e*), the employer will be liable for the manner in which the act is done, to the same extent to which he would be so liable if the agent were paid. If A. lends his servant to B. for a job, the servant becomes *ad hoc* the servant of B., though B. pays nothing for his services (*f*). The question is whether

(*a*) *Per* Coleridge, J., *Milligan* v. *Wedge*, (1840) 12 A. & E. p. 742.

(*b*) *Duke* v. *Courage*, (1882) 46 J. P. 453.

(*c*) *Dalton* v. *Angus*, (1881) 6 App. Cas. 740; *Hughes* v. *Percival*, (1813) 8 App. Cas. 443.

(*d*) *Sadler* v. *Henlock*, (1855) 4 E. & B. 570.

(*e*) *Wheatley* v. *Patrick*, (1837) 2 M. & W. 650.

(*f*) *Donovan* v. *Laing Wharton & Down Construction Syndicate*, (1892) 1 Q. B. 629.

the act is done for the employer (*a*). Again, it does not affect the existence of the relationship that the employer is not allowed by law to do the work for himself, but is compelled to employ an agent of a particular class to do it for him, provided the employer is allowed the power of controlling and dismissing the agent, and provided the class from which the agent is to be taken is sufficiently large to give the employer a practical power of selection. Thus the statutory obligation which rests upon owners of barges on the Thames to employ at least one licensed waterman aboard each craft to navigate her, does not prevent the watermen so employed from being the servants of the owners, there being several thousand licensed watermen to select from, and the owner having a power of control and dismissal (*b*). But where the class is so limited that the employer has practically no power of selection he is not responsible for the negligence of the person employed. It was on this ground that at common law, prior to the passing of the Pilot or Merchant Shipping Acts, the master of a ship was in general not liable for the misconduct of a pilot employed by him in a compulsory pilotage district (*c*).

Although in general the test whether a person stands to another in the relation of master to servant is whether he had the power of controlling his acts and dismissing him for disobedience, it is otherwise where that power of control is not original but delegated from a superior. The fact of a head servant having the power of selecting and dismissing the under servants does not make them his servants, for in employing them he acts merely as agent for his master, and he pays them with his master's money (*d*). For the same reason "superior public officers, such

(*a*) It has indeed been suggested by Cave, J., in *Crupé* v. *Maddick*, (1891) 2 Q. B. p. 415, that if one of two partners drives their horse and cart for the purposes of the partnership business, and in so doing negligently injures a person passing along the highway, the partner so driving would be alone responsible. But for this proposition he cites no authority. The cases of *Ashworth* v. *Stanwix*, (1861) 3 E. & E. 701, and *Mellors* v. *Shaw*, (1861) 1 B. & S. 437, seem to be directly opposed to his view.

(*b*) *Martin* v. *Temperley*, (1843) 4 Q. B. 298.

(*c*) *The Halley*, (1868) L. R. 2 P. C. p. 201. The exemption of the master from liability in such case in now regulated by statute 57 & 58 Vict. c. 60, s. 633,

(*d*) *Stone* v. *Cartwright*, (1795) 6 T. R. 411. So too with agents employed by directors of a company (*Weir* v. *Bell*, (1878) 3 Ex. D. 238).

as the Postmaster-General (*a*), the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer, and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them" (*b*), for such inferiors are the servants not of their superior officers but of the Crown, and are paid with the money of the Crown.

Club servants.

Whether the relationship of master and servant exists between the members of an ordinary club and the club servants has apparently never been decided. It has indeed been suggested from the bench that such club servants are the servants not of the members but of the committee (*c*). But the correctness of that view may be doubted, for the committee would seem to be merely the agents of the members to appoint the servants on their behalf, while the servants' services are rendered for the benefit not of the committee but of the members, and are paid out of the funds not of the committee but of the club. The fact that an individual member cannot dismiss a servant from the club's employment does not conclude the question; for neither can one of a firm of partners dismiss a servant of the partnership against the will of his co-partners. It may be that for any act of negligence done by the servant the committee would be liable, for they are also members of the club, but it is submitted that they would only be liable in the latter character. Members of a club no doubt are not liable in contract for goods supplied to a club on the orders of the committee, but that is because the committee, although they are the agents of the members, have no authority to pledge their principal's credit (*d*); but this cannot affect the question of their liability in tort. The point, however, must be regarded as very doubtful (*e*); although it was held in the case of

(*a*) *Bainbridge* v. *The Postmaster General & Crane*, (1905) 22 T. L. R. 70 C. A.

(*b*) *Per* Erle, C.J., *Tobin* v. *Queen*, (1864) 16 C. B. N. S. p. 351. See above, p. 41.

(*c*) *Per* Rigby, L.J., (1895) 2 Q. B. p. 42.

(*d*) *Flemyng* v. *Hector*, (1836) 2 M. & W. 172.

(*e*) A club is not a private house for the purposes of the Public Health (London) Act, 1891 (*McNair* v. *Baker*, (1904) 1 K. B. 208).

Brown v. *Lewis* (*a*), that the committee of a club, and not the members generally, are the persons primarily liable in tort.

Trades Union officials.

It has been held that the district delegate of a trades union is not the servant of the members of the union although elected by their votes, but that decision turned upon the peculiar position of a district delegate, who is rather in the nature of a protector and adviser than of an inferior (*b*). But as the funds of a trades union have been held liable for the amount of damages recovered, against the trustees of such union, in an action for a libel contained in a newspaper carried on in the interests of the members, the relation existing between the ordinary members of such an association, and its higher officials is probably that of principal and agent (*c*).

It appears probable that the funds of a *Trade Union qua* Trade Union can only legally be employed for the furtherance of one or other of the objects specifically mentioned in section 16 of the Trade Union Act Amendment Act of 1876 (*d*).

Cab drivers.

The relationship between the proprietors and drivers of cabs in the metropolis is at common law clearly not that of master and servant in those cases in which the ordinary practice is followed of the driver paying a fixed daily sum for the use of the cab and horse, or the cab alone, as the case may be; it is merely that of bailor and bailee. And it was formerly thought that the provisions of the London Hackney Carriage Act, by which the proprietor is required to retain possession of the driver's licence, and is made liable to penalties for the misconduct of the driver, did not establish an involuntary relationship of master and servant, in those cases, at all events, in which, the horse and harness being the property of the driver, the proprietor supplied only the cab (*e*). It has now, however, been settled that under that Act, so far as the public is concerned, the *registered proprietor of a hackney carriage* is in all cases as responsible for the acts of the driver whilst he is plying for hire as if the

(*a*) (1896) 12 T. L. R. 455.

(*b*) *Flood* v. *Jackson*, (1895) 2 Q. B. 21.

(*c*) *Linaker* v. *Pilcher*, (1901) 84 L. T. 421; 70 L. J. K. B. 396; 49 W. R. 413.

(*d*) 39 & 40 Vict. c. 22; but see *Swaine* v. *Wilson*, (1889) 24 Q. B. D. 252, C. A.

(*e*) *King* v. *Spurr*, (1881) 8 Q. B. D. 104.

relationship of master and servant existed between them (*a*). Nor is this liability confined to the actual person to whom the carriage license is granted. Consequently where the name of only one member of a partnership appears in the register of cab licenses, action is maintainable against the firm (*b*).

Limits of liability of master for torts of servant.

Where the relationship of master and servant exists the employer is liable for all torts committed by the party employed, provided first they were within what is usually termed the scope of the employment (*c*), and secondly, were either unintentional, that is to say, amounted to mere acts of negligence; or, if intentional, were intended to be done in the interest and for the benefit of the employer.

Subject to these qualifications the master is liable for his servant's torts of all kinds, even for those involving fraud, crime (*d*) and malice. But a principal is not always liable in trespass for the act of his agent, unless he authorised it beforehand, or subsequently assented to it, with knowledge of what had been done (*e*). Although with regard to intentional torts "the general rule is that the master is answerable for every such wrong as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved" (*f*), and in this respect "no sensible distinction can be drawn between the case of fraud and the case of any other wrong" (*g*).

Relationship of master and servant must exist.

There is, however, of course no liability where the circumstances show that, though closely allied to such a connection, the actual relationship of master and servant does not exist between the parties. Thus where the principal of a nursing association—established for the purpose of supplying duly qualified

(*a*) *King* v. *London Improved Cab Co.* (1889) 23 Q. B. D. 281 ; *Keen* v. *Henry*, (1894) 1 Q. B. 292.

(*b*) *Gates* v. *R. Bill & Son*, (1902) 2 K. B. 38 C. A.

(*c*) As to what constitutes scope of employment, see *Sanderson* v. *Collins*, (1904) R. B. 628 C. A. ; *Heiton* v. *McSweeney*, (1905) 2 Ir. R. 47 K. B. D.

(*d*) *Coppen* v. *Moore*, (1898) 2 Q. B. 306 ; *Mackay* v. *Comm. Bank of New Brunswick*, (1874) L. R. 5 P. C. 394 ; *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2. Ex. 259 ; *Dyer* v. *Munday*, (1895) 1 Q. B. 742, C. A. See also *Hambro* v. *Burnand*, (1904) 2 K. B. 10, C. A.

(*e*) *Freeman* v. *Rosher*, (1849) 13 Q. B. 780.

(*f*) *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. p. 265.

(*g*) *Ibid.*

persons—sent a qualified nurse, and the plaintiff was injured by reason of her negligence, it was held that the principal of the association was not liable (*a*).

Scope of the employment.

An Act is said to be within the scope of the servant's employment when, although itself unauthorised, it is so directly incidental to some act or class of acts which the servant was authorised to do that it may be said to be a mode, though no doubt an improper mode, of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorised the master will be responsible, but not for an act wholly unconnected with the class of acts which the servant was authorised to do (*b*). In short, the master's liability for the unauthorised torts of his servant is limited to unauthorised modes of doing authorised acts (*c*).

If the act complained of be a mere impropriety in the mode of performing the servant's duty, it will be immaterial that the servant has express orders not to commit that impropriety (*d*); the master cannot discharge himself from liability by giving instructions to the servant as to the manner in which his duty shall be performed. Therefore, where the driver of the defendants' omnibus with the view of obstructing a rival omnibus drove in front of it, and in so doing did damage, the defendants' liability was held to be unaffected by the fact that the driver had distinct instructions not to obstruct any omnibus whatever (*e*). If, however, the agent performs the tortious act, in order to gratify his own personal spleen, and not in the interests of his employer, his principal is not liable (*f*). But the instructions given by the master to the servant will be very material for the purpose of determining what class of acts the servant was authorised to do, and thereby of ascertaining whether the tortious

(*a*) *Hall & Wife* v. *Lees & Others*, (1904) 2 K. B. 602, C. A.

(*b*) *Beard* v. *London General Omnibus Co.*, (1900) 2 Q. B. 530.

(*c*) *Gracey* v. *Belfast Tramways Co.*, (1901) 2 Ir. Repts. 322.

(*d*) Nor will it make any difference to the civil liability of the master that the act of the servant amounts to a criminal offence (*Dyer* v. *Munday*, (1895) 1 Q. B. 743); *Heiton* v. *McSweeney*, (1905) 2 Ir. R. 47 K. B. D. But see *Cheshire* v. *Bailey*, (1905) 1 K. B. 237, C. A.

(*e*) *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. 526.

(*f*) *Croft* v. *Alison*, (1821) 4 B. & Ald. 590; *Ward* v. *London General Omnibus Co.*, (1873) 42 L. J. C. P. 265.

act complained of was done in the course of employment (*a*). Thus, where a constable employed by a railway company to keep order in their station was given instructions not to arrest persons committing assaults except for the purpose of putting an end to the affray, and he arrested a person whom he believed to have been guilty of assault but after the affray was over, it was held that his having acted in breach of his instructions exonerated the company (*b*). But on the other hand, where a passenger alighted from a train at the station before that to which his ticket was issued, and the station-master, upon his refusal to give up his ticket, locked the only door of exit, although the passenger tendered his name and address, it was held that the company was liable for the act of their officer, upon the ground that locking the door was a ministerial act within the scope of his authority (*c*).

These cases well illustrate the difficulty which frequently exists in saying whether a particular tortious act was merely a mode of doing something authorised, or was altogether unconnected with the subject-matter of the authority. It is impossible to draw any hard-and-fast line between the classes of acts which are within and those which are without the scope of the employment, or to say where the one ends and the other begins. It is in every case a question of degree, and therefore one of fact; and all that can be done in the way of elucidating the matter is to give illustrations. "A footman might think it for the interest of his master to drive the coach, but no one could say it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses" (*d*). Where a housemaid whose duty it was to light a fire, finding that the fire would not burn and believing the cause to be that the chimney was

(*a*) A bailee is not liable to a bailor for the tortious act of his servant, when the tort was committed under circumstances outside the scope of his employment, *Sanderson* v. *Collins*, (1904), 1 K. B. 628, C. A.

(*b*) *Walker* v. *South Eastern R. Co.*, (1870) L. R. 5 C. P. 640; *Knight* v. *North Metropolitan Tramways Co.*, (1898) 78 L. T. 227; *Byrne* v. *Londonderry Tramways Co.*, (1902) 2 Ir. R. 457, C. A.

(*c*) *Farry* v. *Great Northern R. Co.*, (1898) 2 Ir. R. 352.

(*d*) *Per* Blackburn, J., *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. p. 542; *Beard* v. *London General Omnibus Co.*, (1900) 2 Q. B. 530.

choked with soot, with the object of clearing it, but with the knowledge that it was no part of her duty to clean the chimneys, lit some straw in it and thereby set the house on fire and did damage, her master was held not responsible (*a*). Where a solicitor's clerk, who had been forbidden to use his master's lavatory, in disobedience of orders, did so, and left the tap running, whereby damage occurred to the plaintiff, who occupied the floor below, the act of the clerk was considered not sufficiently incident to the ordinary duties of his employment to render his master liable (*b*). Where a servant who had orders from his master to distrain any cattle he might find damage feasant on his master's land, wilfully drove some from off a highway into his master's field and then distrained them there, the master was held not liable (*c*); the act was clearly unconnected with the protection of the master's interests. So too, where a broker employed by a water company to distrain the plaintiff's goods for arrears of water rate, whilst engaged in so distraining committed an unprovoked assault upon the plaintiff, such assault was held to be not a mere excess, but an independent wrong wholly unconnected with the carrying out of his orders, and therefore his employers were not responsible (*d*).

Criminal act of servant.

And where a jobmaster supplied a brougham, horse, and coachman to a travelling silversmith, and the coachman, who was an accomplice of thieves, drove the carriage to a place where the greater part of the samples were stolen, it was held that the jobmaster was not responsible, the criminal act of the servant not having been done within the scope of his employment (*e*).

Liability of jobmaster.

But on the other hand, a jobmaster, letting out a carriage and driver to a travelling jeweller, was held liable for the loss of jewels, left by the hirer in the carriage in charge of the driver, upon the ground that it was the duty of the defendant to provide a coachman, who should take ordinary care of the vehicle during the temporary absence of the traveller (*f*), and that the lack of such

(*a*) *M'Kenzie* v. *M'Leod*, (1834) 10 Bing. 385.

(*b*) *Stevens* v. *Woodward*, (1881) 6 Q. B. D. 318.

(*c*) *Lyons* v. *Martin*, (1838) 8 A. & E. 512.

(*d*) *Richards* v. *West Middlesex Waterworks Co.*, (1885) 15 Q. B. D. 660.

(*e*) *Cheshire* v. *Bailey*, 1905) 1 K. B. 237, C. A.

(*f*) *Abraham* v. *Bullock*, (1902) 86 L. T. 796, C. A.

Assault by servant.

care was negligence within the scope of the employment. Again, in *Dyer* v. *Munday* (*a*), where a servant while engaged in recovering his master's property was resisted, and committed the assault (apparently a slight one) for the purpose of overcoming that resistance, his master was held liable. But it is not every assault committed by a servant for the protection of his master's property that can be treated as within the scope of his employment. Whether it is so or not is a question of degree. In *Kinsella* v. *Hamilton* (*b*) one of a party employed to effect a distress, finding that the execution of the distress was forcibly resisted, fired at and killed one of the persons offering the resistance. In an action under Lord Campbell's Act, against the person who authorised the distress, it was held, that, as the taking of life cannot be justified for the protection of property, the firing, although the distress could have not been effected without it, was not so incident to the levying of the distress as to render the defendant answerable for the consequences. The authority of an omnibus conductor to superintend the conduct of the omnibus generally includes an authority to remove any passenger who in his judgment has misconducted himself, and for any excess of violence on the part of the conductor in removing such passenger the proprietors of the omnibus will be responsible (*c*). But such delegated authority does not extend to giving a passenger into custody, upon a charge of tendering bad money (*d*).

The tort must be incidental to the doing of something really authorised.

The master's liability for the unauthorised torts of his servants is, as stated above, limited to unauthorised modes of doing authorised acts; unless the act complained of is directly incidental to the doing of something which is really authorised the master is not liable. It is, therefore, material in every case to inquire what acts the master has authorised, what acts, that is to say, the master really intends the servant to have authority to do.

When the act complained of is directly incidental to the doing of something *expressly* authorised, no difficulty arises on this point, except perhaps in cases in which the master is not an

(*a*) (1895) 1 Q. B. 742.
(*b*) (1890) 26 L. R. Ir. 671.
(*c*) *Seymour* v. *Greenwood*, (1861) 7. H. & N. 355. See too *Bayley, Manchester, Sheffield, &c., R. Co.* (1873) L. R. 8 C. P. 148.
(*d*) *Knight* v. *North Metropolitan Tramways Co.*, (1898) 78 L. T. 227.

individual but a corporation (*a*). But the authority which the master really intends the servant to have is rarely defined in express terms; it is generally left either partially or wholly to be *inferred* from the surrounding circumstances, and the nature of the business in which the servant is employed.

In considering what acts the servant has an inferred authority to do, it seems that no intention is to be inferred on the part of the master to authorise the doing of any acts which he might not lawfully do himself. Thus, railway companies having no statutory power to arrest persons travelling on their lines for non-payment of the fares of animals in their charge, where a station-master arrested a passenger on the assumption that he had wrongfully taken a horse by train without paying its fare, it was held that no authority to the station-master to arrest under such circumstances could be inferred, and, there being no evidence of any express authority to do so by regulation or otherwise, the company were held not responsible for the arrest (*b*).

No doubt a master cannot lawfully commit a fraud, and yet under certain circumstances he may be liable for it when committed by his servant, but in such case the ground of his liability is not that there is any inference of authority to the servant to commit the fraud, but that the servant has authority to conduct the transaction lawful in itself, in the course of which the fraud is committed, and that the fraud is merely an improper mode of conducting it (*c*).

Implied authority to exercise discretion in cases of necessity.

Where a servant has authority to do a particular act upon a particular occasion arising, and the act is of a kind which, if it is to be done at all, must be done immediately upon the arising of the occasion, the servant will, in the absence of the master or of any superior servant to whom he can refer the question, have an implied authority to exercise his judgment and determine as a preliminary to the doing of the act whether the occasion for doing it has arisen; and if in the exercise of that judgment the servant makes a mistake the master will be responsible for it, or, in the words of, Wright, J. (*d*): "In cases of sudden emergency, a

(*a*) As to which see above, p. 59.

(*b*) *Poulton* v. *London & South Western R. Co.*, (1867) L. R. 2 Q. B. 534.

(*c*) *Coppen* v. *Moore*, (1898) 2 Q. B. 306; *Heiton* v. *McSweeney*, (1905) 2 Ir. R. 47, C. A.

(*d*) *Gwilliam* v. *Twist*, (1895) 1 Q. B. at p. 557. Compare *Beard* v. *London*

servant has an implied authority from his employer to act in good faith according to the best of his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of authority, and must not act in a manner which is plainly unreasonable."

Thus an omnibus conductor or railway guard, whose duty it is to remove from the omnibus or train under his charge any passenger who misconducts himself, has an implied authority to determine in each particular case whether the passenger has misconducted himself (*a*). Where, however, there are upon the spot several servants of different grades, all of them charged with authority to do the act on the occasion arising, it is not necessarily all of such servants who will have the authority to determine whether the occasion for action has arisen; it is in such case a question for the jury whether the particular servant who exercises the determination had authority so to determine (*b*).

Nor is it sufficient for the jury to find that the servant had in fact, under certain circumstances, a sufficient authority delegated to him to cover the tortious act committed; it being also necessary, in order to render the master liable, for the plaintiff to show, and for the jury to find, that the necessities of the particular case actually raised, by implication, an authority for the servant to perform the act complained of (*c*). In *Hawtayne* v. *Bourne* (*d*) it was held that a servant cannot be treated as having any implied authority to pledge his master's credit in cases of necessity, however pressing; and, if so, he can have no implied authority to employ a servant for reward, a limitation which practically covers the whole field of employment.

All servants of railway companies may, by virtue of the provisions of the Regulation of Railways Act, 1889 (*e*), lawfully arrest a passenger who "having failed either to produce, or, if

General Omnibus Co., (1900) 2 Q. B. 530.

(*a*) *Seymour* v. *Greenwood*, (1861) 7 H. & N. p. 358; *Bayley* v. *Manchester, Sheffield, &c., R. Co.*, (1873) L. R. 8 C. P. 148.

(*b*) *Per* Jervis, C.J., *Giles* v. *Taff Vale R. Co.*, 2 E. & B. p. 830. And see *Owners of Apollo* v. *Port Talbot Co.*, (1891) A. C. 499. As to onus of proof of authority, see *Beard* v. *London General Omnibus Co.*, (1902) 2 Q. B. 530.

(*c*) *Hanson* v. *Waller*, (1901) 1 Q. B. 390.

(*d*) (1841) 7 M. & W. 595; *Wright* v. *Glyn*, (1902) 86 L. T. 373, C. A.

(*e*) 52 & 53 Vict. c. 57, s. 5.

requested, to deliver up, a ticket showing that his fare is paid; or to pay his fare, refuses, on request by such officer or servant to give his name and address." But a passenger giving his correct name and address may not be detained pending enquiries as to the accuracy of the information (*a*).

And the fact that a particular servant takes upon himself to arrest a passenger under the above circumstances, is *primâ facie* evidence that he is invested by the company with authority so to do, even though there are servants of higher grades upon the spot, to whom he might have referred the matter (*b*).

Implied authority of servants to do what is necessary to protect property entrusted to their charge.

All servants have *primâ facie* an implied authority to do all those things that are necessary for the protection of the property entrusted to their charge (*c*); and this seems to include an authority to arrest and search a person whom the servant reasonably believes to have stolen such property, if he could not recover it without taking the supposed thief into custody. Therefore, where a ticket-clerk in the employment of a railway company, being entrusted with the custody of the tickets, suspected a passenger of having feloniously abstracted a ticket from the counter, and with the object of recovering possession of the ticket, detained the passenger on a charge of stealing it, and searched him, it was held that he had implied authority to do so, and that the company were liable for his act (*d*). This authority to arrest persons suspected of stealing their master's property is, however, probably confined to the case of property entrusted to the custody of the servant causing the arrest, and does not extend to the case of property entrusted to the custody of a fellow servant. But no servant has any implied authority to arrest a person suspected of an attempt to steal his master's property after the attempt has ceased; for the arrest of the supposed offender is in such case material only to the vindication of justice, and not to the protection of the master's interests (*e*); and this rule

(*a*) *Knights* v. *London, Chatham & Dover R. Co.*, (1893) 62 L. J. Q. B. 378.

(*b*) *Goff* v. *Great Northern R. Co.*, (1861) 3 E. & E. 672; *Moore* v. *Metropolitan R. Co.*, (1872) L. R. 8 Q. B. 36.

(*c*) *Per* Blackburn, J., *Allen* v. *London & South Western R. Co.*, (1870) L. R. 6 Q. B. p. 69.

(*d*) *Van Den Eynde* v. *Ulster R. Co.*, (1871) 5 Ir. Rep. C. L. 328.

(*e*) *Allen* v. *London & South Western R. Co.*, (1870) L. R. 6 Q. B. 65; *Abrahams* v. *Deakin*, (1891) 1 Q. B. 516.

equally applies where the supposed attempt to steal is still continuing, if the arrest is unnecessary to the recovery of the property (*a*). Whether, indeed, in any case a servant can have implied authority to institute a prosecution for a supposed larceny of or injury to the master's property is very doubtful; probably he cannot, for the master cannot be inferred to authorise the doing of acts which cannot be for his benefit (*b*).

Implied authority of solicitor of party issuing *fi. fa.* to direct sheriff what goods to seize.

It has been held that the solicitor of a judgment creditor issuing a *fi. fa.* has no implied authority from his client to give verbal directions to the sheriff where or what goods to seize (*c*); but that, on the other hand, it is within the scope of his implied authority to indorse such direction in writing on the writ (*d*). The explanation of this distinction is that the Court of Appeal which decided the former case, though disapproving the decision in the latter, regarded it as too long established to justify them in overruling it.

The servant at the time of committing the tort must be engaged on his master's business.

To render the master liable, however, for the servant's misconduct, it is not enough that the misconduct should have occurred in the course of doing an act of a kind which the servant was usually authorised to do, unless at the time the servant was doing it on the master's behalf. Thus it is the ordinary duty of a carman to drive his master's horse and cart; but where a carman after having finished his day's work, and before shutting up his master's horse and cart for the night started off with it without the master's knowledge on business of his own, and in the course of his journey negligently drove over the plaintiff, the master was held not liable (*e*). But if the carman while engaged on his master's business improperly and for his own purposes made a slight detour the master might be liable; in such case "it is a question of degree as to how far the deviation could be considered a separate journey" (*f*).

(*a*) *Edwards* v. *London & North Western R. Co.*, (1870) L. R. 5 C. P. 445; *Hanson* v. *Waller*, (1901) 1 Q. B. 390; *Stevens* v. *Hinshelwood*, (1891) 55 J. P. 341, C. A.

(*b*) But see *Bank of New South Wales* v. *Owston*, (1879) 4 App. Cas. 270.

(*c*) *Smith* v. *Keal*, (1882) 9 Q. B. D. 340, and see *Power* v. *Fleming*, (1870) Ir. R. 4 C. L. 404.

(*d*) *Jarmain* v. *Hooper*, (1843) 6 M. & G. 827. See above, p. 69, note (*b*).

(*e*) *Mitchell* v. *Crasweller*, (1853) 13 C. B. 237; and see *Sanderson* v. *Collins*, (1904) 1 K. B. 628, C. A.

(*f*) *Per* Cockburn, C.J., *Storey* v. *Ashton*, (1869) L. R. 4 Q. B. p. 480.

Whether a master is to be held responsible for the negligence of the servant in the course of doing something which the servant is not employed to do, but is merely permitted to do, for his own pleasure or convenience, has never been much considered; but it is apprehended that the act to which the negligence is directly incidental must, on the principle of the above cases, and by analogy to the rule as to wilful torts (*a*), be done on behalf of the master, and that it is not enough that it should have been merely permitted. If a servant does an act for his own pleasure, *quoad* that act he is a stranger to his master, although he may be in other respects engaged at the time upon the master's business, and the mere fact that the master does not prohibit the doing of the act ought not to render him liable. But where the first and main object of the action in which the servant was engaged, at the time of committing the tort, was his master's advantage, the wrong-doing of the tort-feasor relates back to his employer, who consequently becomes liable for the acts of his servant (*b*). In *William* v. *Jones* (*c*), where the plaintiff lent a shed to the defendant to make a signboard in, and a carpenter employed by the defendant whilst at work in the shed making the signboard lit his pipe with a shaving and dropped the lighted shaving on to the ground whereby he set fire to the shed, the majority of the Court indeed suggested that if the defendant had known that the carpenter was in the habit of smoking, and had taken no steps to prevent his doing so in the plaintiff's shed, he might have been liable; but it is inferred that the liability there suggested was a liability on the contract of loan, not a liability in tort. However, in *Ruddiman* v. *Smith* (*d*), where the defendants had in their office a lavatory for the use of their clerks, and one of the clerks, after office hours, and preparatory to leaving the office for the night, went to the lavatory for the purpose of washing his hands and left the tap turned on, whereby damage happened to the plaintiffs who occupied the floor below, a Divisional Court held that the defendants were responsible, notwithstanding that the use of the lavatory by the clerk being after office hours, was for his own

Negligence of servant in course of doing something which he is permitted to do for his own convenience.

(*a*) As to which see below, p. 84.
(*b*) *Gracey* v. *Belfast Tramway Co.*, [1901] 2 Ir. Repts. 322.
(*c*) 1864–5) 3 H. & C. 602.
(*d*) (1889) 5 Times L. R. 417.

private purposes and not for the purpose of fitting him to discharge his duty to his employers. But the actual decision in this case may perhaps be supported on grounds unconnected with the law of agency; the case may possibly come within the principle that a person who permits another to commit a nuisance on his premises is responsible for it, although the parties may not stand in the relation of principal and agent. Where, however, the employee is a trespasser, no responsibility attaches to his master. Thus when under similar circumstances to the above, a clerk, in spite of the express prohibition of his employer, entered his room in his absence, and after washing his hands in the lavatory left the tap running, it was held that the master was not liable for the damage caused thereby (*a*).

Tort where wilful must be intended for master's benefit.

As a rule, in order to render a master liable for his servants' torts the actual misconduct itself must, if intentional, have been done on the master's behalf (*b*). If, though in other respects within the scope of the employment, it be done from any other motive than that of benefiting the master, the master cannot be held responsible. "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable" (*c*); but if he do precisely the same act with object of extricating his master's carriage from a difficulty his master will be liable (*d*). So where a bank manager made a false representation as to the pecuniary position of a customer of the bank, with the view of inducing the plaintiff to supply goods to the customer upon credit to enable him to carry out a government contract, and did so with the object of enabling the customer, on receipt of the government contract money, to reduce the amount of his indebtedness to the bank, the bank was held responsible for the fraud of the manager (*e*). But where, on the other hand, a secretary of a company, in answers to questions put to him as to the validity of certain debenture stock of the

(*a*) *Stevens* v. *Woodward*, (1881) 6 Q. B. D. 320.

(*b*) *Armitage* v. *Lancashire & Yorkshire R. Co.*, (1902) 2 K. B. 178, C. A.

(*c*) *Croft* v. *Alison*, (1821) 4 B. & Ald. p. 592.

(*d*) *Ibid.* And cp. *Dyer* v. *Munday*, (1895) 1 Q. B. 742, with *Richards* v *West Middlesex Waterworks Co.*, (1885) 15 Q. B. D. 660.

(*e*) *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259.

company, made fraudulent statements for his own private ends and not for the benefit of the company, it was held that the company were not liable, although the answering of such questions was within the scope of his employment (*a*).

Measure of master's liability for fraud of servant.

Provided the tortious act is within the scope of the servant's employment and is committed with the object of benefiting the master, the measure of the master's liability will be precisely the same as if the act had been committed by himself, that is to say, it will not be confined to the amount of the benefit he has actually received, but will extend to the whole amount of the loss suffered by the plaintiff; and this will apply as well to frauds as to trespasses. A master is liable for the fraud of his servant beyond the extent to which he has profited by such fraud (*b*); though, in order to charge any person with a fraud which has not been personally committed by him, the agent who actually committed the fraud must have done so while acting within the scope of his authority (*c*). But as regards his liability for his servant's torts, "no sensible distinction can be drawn between the case of fraud and the case of any other wrong" (*d*). In none of the cases, indeed (with apparently one exception), in which a master has been held liable in tort for his servant's fraud, did this question arise, the amounts of the benefit and loss respectively having been in all such cases co-extensive; but in *Swift* v. *Winterbotham* (*e*), where a bank manager, within the scope of whose employment it was to answer enquiries as to the credit of customers of the bank, in reply to such an enquiry made a fraudulent statement as to a particular customer's credit, whereby the person on whose behalf the enquiry was made sold goods to the customer on credit and lost their price in consequence of his insolvency, the bank were held liable to the extent of the value of the goods, although they

(*a*) *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, (1887) 18 Q. B. D. 714; *Thorne* v. *Heard*, (1894) 1 Ch. 599; and (1895) A. C. 495; and see *Ruben* v. *Great Fingall Consolidated and Others*, (1904) 2 K. B. 712, C. A. The case of *Shaw* v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, must be treated as overruled.

(*b*) *Semble per* Lord Selborne, *Houldsworth* v. *City of Glasgow Bank*, (1880) 5 App. Cas. p. 329.

(*c*) *Thorne* v. *Heard*, (1895) A. C. 495.

(*d*) *Per Cur.*, *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. p. 265.

(*e*) (1873) L. R. 8 Q B. 244.

in fact derived no benefit whatever from the false statement. This case was decided on the authority of *Barwick* v. *English Joint Stock Bank*, and therefore it must be assumed that the manager in making the false statement intended to act in the interest of the bank, his object being probably to do a service to the customer and thereby retain his custom. This decision, indeed, was reversed in the Exchequer Chamber on a different point; but notwithstanding such reversal, it must, as an authority on the point now under discussion, be treated as standing good. In the *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (*a*), Bowen, L.J., doubted whether statutory corporations can be made liable beyond the actual benefit received, on the ground, apparently, that their powers being limited, they cannot bind themselves to answer for the consequences of the representation made. But this doctrine apparently applies only when the statutes by which the corporation is created or regulated are either expressly or by implication violated; or, in other words, where the tortious act was originally *ultra vires* (*b*).

For injury caused by servant to fellow-servant in common employment master not liable at common law.

To the rule that a master is liable for injuries caused by the negligence of his servant in the course of his employment, an exception exists where the party injured is not a stranger but a fellow-servant of the party causing the injury and engaged in a common employment with him. Towards such servant the master is at common law not liable (*c*); unless, indeed, the injury, though actually committed by the hand of the fellow-servant, was either mediately or immediately occasioned by some cause of which the employer was, and the workman was not, aware (*d*). But to exempt the master from liability in such case all the above conditions must be satisfied. *First*, the servants must be fellow-servants; *second*, they must be in the service of a common employer; and *third*, as before stated, the cause of the accident must not be one that was apparent to the master and concealed from the servant. Therefore where one of a joint staff

(*a*) *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, (1887) 18 Q. B. D. p. 719.

(*b*) *Preston* v. *Liverpool, Manchester & Newcastle Ry.*, (1856) 5 H. L. Cas. 605.

(*c*) *Priestley* v. *Fowler*, (1837) 3 M. & W. 1.

(*d*) *Griffiths* v. *London & St. Katherine's Dock Co.*, (1884) 13 Q. B. D. 259, C. A.; and see *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. 685, C. A.

of servants at a railway station used by two companies was employed by and dismissible by one of the companies only, his employers were held responsible for injuries caused by his negligence to another member of the staff employed by the other company. It is not enough that the work should be common, but both parties must be servants of the same master (*a*), but when an accident is caused "to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master," according to Lord Cairns, the master "is not liable, although the two workmen cannot technically be described as fellow-workmen" (*b*). For the same reason, one who engages an independent contractor to do certain work as part of a job upon which his own servants are employed, is liable for injuries caused by the negligence of the latter to the servants of the contractor (*c*). Provided, however, that the two parties are both servants of the same master, in considering whether they are fellow-servants it is immaterial that they are not of the same grade. "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority" (*d*), although the doctrine of "common employment" does not cover the case of an employer *personally* injuring an employee (*e*). Thus the captain and crew employed in the navigation of a ship by the owner are fellow-servants within the meaning of the rule (*f*).

Secondly, they must be engaged on a common employment, that is to say, the work must be common, but it need not be identical. "It is not necessary for this purpose that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and

(*a*) *Swainson* v. *North Eastern R. Co.*, (1878) 3 Ex. D. 341.

(*b*) *Wilson* v. *Merry*, (1868) L. R. 1 Sco. App. at p. 332.

(*c*) *Johnson* v. *Lindsay*, (1891) A. C. 371; *Cameron* v. *Nystrom*, (1893) A. C. 308; and see *Claridge* v. *Union Steamship Co.*, (1894) A. C. 185; *Waldock* v. *Winfield*, (1901) 2 K. B. 596.

(*d*) *Per* Lord Cranworth, *Wilson* v. *Merry*, (1868) L. R. 1 H. L. Sc. App. p. 334.

(*e*) *Warren* v. *Wilder*, (1872) 41 L. J. C. P. 104 n.

(*f*) *Hedley* v. *Pinkney & Sons Steamship Co.*, (1892) 1 Q. B. 58; H. L., (1894) A. C. 222.

those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in common work" (*a*), and in one instance the rule was applied in the case of persons whose duties were so diverse as the general traffic manager of a railway company and a milesman (*b*). "Where the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one, in what he is doing as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other" (*c*). Whether the work is common is in each case a question of degree, "but in general, by keeping in view what the servant must have known, or expected to be involved in the service which he undertakes, a satisfactory conclusion may be arrived at" (*d*). In addition to which, it is necessary that the employment must be common, in the sense that the safety of the one servant must, in the ordinary and natural course of things, depend on the care and skill of the others (*e*).

Principle on which doctrine of common employment rests.

The principle upon which the master's exemption from liability in such cases rests is this, that "a servant who engages for the performance of services for compensation does as an implied part of the contract take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that the compensation was adjusted accordingly, or in other words, that these risks are considered in his wages" (*f*).

Doubtful whether master liable for injuries caused to guests.

It has indeed been suggested that this exception to the general liability of a master for the negligence of his servants is not confined to the case of injuries to fellow-servants, but that "it extends to guests who cannot sue the master of the house for an

(*a*) *Per* Lord Cranworth, *Bartonshill Coal Co.* v. *Reid*, (1858) 3 Macq. p. 295.

(*b*) *Conway* v. *Belfast, &c., R. Co.*, (1877) 11 Ir. R. C. L. p. 345.

(*c*) *Per* Brett, L.J., *Charles* v. *Taylor*, (1878) 3 C. P. D. p. 496.

(*d*) *Per* Lord Chelmsford, *Bartonshill Coal Co.* v. *McGuire*, (1858) 3 Macq. p. 308.

(*e*) *Morgan* v. *Vale of Neath R. Co.*, (1864) 5 B. & S. at p. 580.

(*f*) *Per* Blackburn, J., *Morgan* v. *Vale of Neath R. Co.*, (1864) 5 B. & S. p. 578.

injury done by his servants" (*a*). It has been said that "if a lady who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress, which spoils it, the master of the house would not be liable. Where a person enters a house by invitation, the same rule prevails as in the case of a servant" (*b*). This notion, however, seems to be opposed to principle. A guest cannot be presumed to take upon himself the risk of the negligence of his host's servants, for the guest receives no wages in which such risks can be considered. The relationship of host and guest can, in point of law, be regarded as neither more nor less than that of a licensor and licensee (*c*): and a licensor is as towards a bare licensee liable for acts of negligence committed by his servants after the licensee has entered upon the premises, as, for instance, where the servants of the owner of a private way passing by his warehouse, by negligently lowering goods from the warehouse, injure a person using the way by the owner's permission (*d*). The absence of authority on the point is obviously attributable to the feelings of delicacy which would naturally restrain a guest from suing. Whether a son can sue his father for the negligence of his servants, will depend upon the question whether the son was residing in the house in the character of a servant or in that of a guest.

Volunteers.

But though the exception probably does not extend to the case of guests, it does extend to that of third persons who take upon themselves, without the defendant's consent, to assist the defendant's servants in doing their work. "One who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even knowledge of his master, cannot stand in a better position than those with whom he associates himself in respect of their master's liability" (*e*).

(*a*) *Per* Bramwell, L.J., *Swainson* v. *North Eastern R. Co.*, (1878) 3 Ex. D. p. 348.

(*b*) *Per* Pollock, C.B., *Southcote* v. *Stanley*, (1856) 1 H. & N. p. 249. The actual decision in that case may well be supported on the ground that the plaintiff was a bare licensee, and that the existence of the source of danger was unknown to the defendant.

(*c*) If there is any such distinction, at what point does a person cease to be a mere licensee and become a guest? Is the supply of gratuitous refreshment necessary?

(*d*) *Gallagher* v. *Humphrey*, (1862) 6 L. T. N. S. 684; *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596.

(*e*) *Per* Erle, C.J., *Potter* v. *Faulkner*, (1861) 1 B. & S. p. 806.

Whether, however, the master will be liable for the negligence of his servants to a volunteer who gratuitously assists the servants in their work with the full knowledge and assent of their master is doubtful. On the one hand, such person in doing the work with the master's assent, and for the master's benefit, would, in respect of such work, become the servant of the master so as to render the master liable for any negligence on his part towards a stranger. But, on the other hand, as he would receive no wages in which the risk of the fellow-servant's negligence could be considered, there would be no consideration for any implied contract to take such risk upon himself. Where, indeed, a person, who gratuitously assists another's servants in their work with their master's assent, is something more than a volunteer, and renders the assistance less for the benefit of the master than for his own, it may be that the master will be liable to him for any negligence on the part of his servants. Thus, where the plaintiff caused a heifer to be sent to him by the defendants' railway to a particular station, and on arrival of the animal at the station he, with the assent of the station-master, assisted the defendants' servants in shunting the truck in which the heifer was, with the view of expediting its delivery to himself, and whilst so engaged, was injured by the negligence of the defendants' servants, it was held that the defendants were liable (*a*). But with regard to that case it is to be observed that the plaintiff, not having rendered the assistance for the benefit of the master, did not place himself in the position of a servant at all.

Master liable to servant for his own negligence.

But although at common law a servant when entering into the service impliedly takes upon himself the risk of the negligence of his fellow-servants, he does not take on himself the risk of his master's negligence. For his own acts of negligence the master is liable to his servant; and as it would be an act of negligence on the part of the master when engaging servants not to take precautions to ascertain whether they were persons of competent skill, in the event of his omitting to take such precautions he will be liable for any injury caused by the unskilfulness of such servant

(*a*) *Wright* v. *London & North Western R. Co.*, (1876) 1 Q. B. D. 252; and see *Holmes* v. *North Eastern Ry.*, (1869) L. R. 4 Ex. 254; L. R. 6 Ex. 123.

to a fellow-servant (*a*). So it is personal negligence on the part of a master to retain in his employment a servant who, to his knowledge, is habitually negligent, and if by such servant's negligence a fellow-servant be injured, the master will be responsible (*b*). Again, a master is liable at common law if an accident happens to his servant owing to the premises, plant or machinery being in an unsafe condition unknown to the servant, if the master either knew of the danger or would have discovered it if he had exercised reasonable care. "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so" (*c*). Thus, where a workman was killed in a coal pit by the fall of a stone which overhung an underground way, and there was evidence that the employers' agents below ground knew of the danger, though no evidence that the employers themselves knew of it, the House of Lords held that there was evidence for the jury that the employers had failed in their duty (*d*). The liability of the employers in that case would seem to arise, not from the knowledge of the agents, for they were fellow-servants with the deceased workman, and negligence on their part could create no liability in their employers, but from the failure of the employers themselves to personally inspect the dangerous way. In *Smith* v. *Baker* (*e*), where a workman was injured by a defect in the master's works, Lord Watson said: "At common law, his (the master's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect." And this duty of the master to take reasonable precautions for his servant's safety must extend to the condition of the premises just as much as to that of the plant. The servant seems even at common law, so far as his master's personal duty was concerned, to have been in the same

(*a*) *Hutchinson* v. *York & Newcastle R. Co.*, (1850) 5 Exch. 343; *Tarrant* v. *Webb*, (1856) 18 C. B. 797; *Smith* v. *Howard*, (1870) 22 L. T. N. S. 130.

(*b*) *Senior* v. *Ward*, (1859) 28 L. J. Q. B. 139. A single instance of forgetfulness may be proof of incompetence (*Barter* v. *L. & C. Printing Works*, (1899) 1 Q. B. 901).

(*c*) *Per* Lord Cranworth, (1854) 1 Macq., p. 751.

(*d*) *Paterson* v. *Wallace*, (1854) 1 Macq. 748; *Groves* v. *Lord Wimborne*, (1898) 2 Q. B. 402; *Williams* v. *Birmingham Battery & Metal Co.*, (1899) 2 Q. B. 338, C. A.

(*e*) (1891) A. C. p. 356.

position as a licensee coming on business. In one case indeed (*a*), it was said to be essential to aver in the statement of claim that the danger which caused the accident to the servant was known to the master. But the rule seems to have been stated there too narrowly. What the Court were there directly concerned with was the necessity, not of the knowledge of the master, but of the ignorance of the servant (*b*).

But although it is usually essential to the servant's right of action, in such cases, that the danger should have been unknown to the servant, mere general knowledge by him that there is a danger of some degree will apparently not suffice to discharge the master; there must be such knowledge as involves a full comprehension of the risk (*c*), coupled, apparently, with an agreement on the part of the workman to undertake the danger occasioned by the absence of proper and fit appliances (*c*).

Where the servant is employed by a partnership, each member of the firm will be liable to the servant for injuries arising from the negligence of the co-partners (*d*).

Employers' Liability Act.

The above Common Law rule that a master is not responsible to his servant for the negligence of a fellow-servant, has, however, been considerably modified by the Employers' Liability Act, 1880 (*e*), by s. 1 of which it is enacted that "where personal injury is caused to a workman (1) by reason of any defect in the condition of the ways (*f*),

(*a*) *Griffiths* v. *London & St. Katherine Docks Co.*, (1884) 13 Q. B. D. 259.

(*b*) The case of *Seymour* v. *Maddox*, (1851) 16 Q. B. 326, where a declaration which alleged that the plaintiff was employed as a chorus-singer at the defendant's theatre, and that, owing to the defendant's neglect to light and fence a certain hole in the floor of the theatre, the plaintiff fell down the hole and was injured, was held bad, turned purely on a question of pleading. The declaration did not sufficiently aver the facts from which the duty alleged arose. Amongst other things it did not negative the plaintiff's knowledge of the danger.

(*c*) *Williams* v. *Birmingham Battery & Metal Co.*, (1899) 2 Q. B. 338, C. A.; and see the discussion on the subject of "*Volenti non fit injuria*" below, at the end of Ch. XV.

(*d*) *Ashworth* v. *Stanwix*, (1861) 3 E. & E. 701; *Mellors* v. *Shaw*, (1861) 1 B. & S. 437.

(*e*) 43 & 44 Vict. c. 42.

(*f*) The defect in the ways, by which is meant "a lack or absence of something essential to completeness" (*Tate* v. *Latham & Sons*, (1897) 1 Q. B. 502 at p. 506), in some material thing "which may be used within, or used in connection with, the business of the employer" (*McGiffin* v. *Palmer*, (1882) 10 Q. B. D. 5, p. 8), must be a "somewhat chronic" defect, not the result of a mere negligent user (*Willetts* v. *Watt & Co.*, (1892) 61 L. J. Q. B. 540, at p. 545; (1892) 2 Q. B. 92).

works (*a*), machinery, or plant (*b*), connected with or used in the business of the employer (*c*); or (2), by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (*d*) whilst in the exercise of such superintendence; or (3), by reason of the negligence (*e*) of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform (*f*), and did conform, where such injury resulted from his having so conformed; or (4), by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5), by reason of the negligence of any person in the service of the employer who has the charge or control (*g*) of any signal, points, locomotive engine, or train upon a railway (*h*), the workman, or in case the injury results in death, the legal personal representatives of the workman and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

Provided that a workman is not to be entitled under the Act to

(*a*) *Smith* v. *Baker*, (1891) A. C. 325; *Brannigan* v. *Robinson*, (1892) 1 Q. B. 344.

(*b*) *Heske* v. *Samuelson*, (1883) 12 Q. B. D. 30; *Cripps* v. *Judge*, (1884) 13 Q. B. D. 583. But an employer is not bound to keep pace with the latest inventions in machinery or appliances (*Butler* v. *Bernbaum*, (1891) 7 T. L. R. 287). For definition of "plant," see *Yarmouth* v. *France*, (1887) 19 Q. B. D. 647, at p. 658.

(*c*) Machinery merely because it is being removed in a broken-down condition does not thereby cease to be "machinery" within the meaning of s. 1, subs. 1 of the Employers' Liability Act. 1880 (*Thompson* v. *City Glass Bottle Co.*, (1902) 1 K. B. 233).

(*d*) *Shaffers* v. *General Steam Navigation Co.*, (1883) 10 Q. B. D. 356; and see *Macdonald* v. *Wyllie*, (1898) 1 F. Ct. of Sess. 339. As to what constitutes a person having superintendence entrusted to him, see *Hall* v. *North Eastern R. Co.*, (1885) 1 T. L. R. 359; *Kellard* v. *Rooke*, (1888) 21 Q. B. D. 367.

(*e*) *Wild* v. *Waygood*, (1892) 1 Q. B. 783. The negligence need not be in the order itself; it may be subsequent to the order, provided the accident result from such negligence, coupled with the act of the workman in conforming to the order.

(*f*) *Snowden* v. *Baynes*, (1890) 25 Q. B. D. 193; *Dolan* v. *Anderson*, (1885) 12 Rettie, Ct. of Sess. 804; *Marley* v. *Osborne*, (1894) 10 T. L. R. 388.

(*g*) *Gibbs* v. *Great Western R. Co.*, (1879) 12 Q. B. D. 208.

(*h*) *M'Cord* v. *Cammell & Co.*, (1896) A. C. 57; *Cox* v. *Great Western Ry.*, (1882) 9 Q. B. D. 106.

any remedy against his employer "under sub-section 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer (*a*); or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;" or, "under sub-section 4 of section 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of his Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law;" or "in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence" (*b*). It is not to be inferred from this last clause that the mere giving of notice to the superior will entitle the servant to sue in a case in which with knowledge of the danger he voluntarily courts the risk; the object of the statute was to place the servant in respect of the negligence of his fellow-servant in the same position as a stranger coming on business (*c*). In construing the term "workman," for the purposes of the Employers' Liability Act of 1880, it has been held, that an independent contractor who works with his men "is not a fellow-workman" with them. Consequently (there being no privity or relationship of master and servant between the employer of the independent contractor and the workmen engaged by the contractor) the person by whom the independent contractor is employed is under no responsibility to a workman, engaged by the latter, who may be injured by the negligence of the

(*a*) On this point the Act seems to give no new remedy, but to be merely declaratory of the Common Law.

(*b*) s. 2.

(*c*) See *per* Bowen and Fry, L.JJ., *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. 685; and see below, discussion at end of Ch. XV.

independent contractor or his workmen during the course of the employment (*a*).

A person is not, however, entitled to sue under the Act unless he gives notice of the injury he has sustained within six weeks, and the action is commenced within six months from the occurrence of the accident, or in case of death within twelve months from the time of death (*b*). The compensation recoverable under the Act is limited to the amount of three years' earnings (*c*). The action can only be brought in a County Court (*d*).

Class of servants to which the statute applies.

The above Act does not apply to servants of all kinds but only to workmen, which expression is defined (*e*) to mean railway servants whether engaged in manual labour or not, and persons to whom the Employers and Workmen Act, 1875, applies, in which Act "the expression workman does not include a domestic or menial servant, but save as aforesaid means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer" (*f*).

It has been held that an omnibus conductor (*g*), a railway guard (*h*), a grocer's assistant (*i*), and a tram-car driver (*k*), are not persons engaged in manual labour, and are consequently not within the definition of "workmen" as used in the Employers and Workmen Act, 1875.

Many of the anomalies of the Employers' Liability Act, 1880, however, have been removed (especially in the case of dangerous employments) by subsequent legislation; the effect of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), as amplified by the later Act of 1900 (63 & 64 Vict. c. 22), being to include within the generic term "workman" (*l*), every

(*a*) *Marrow* v. *Flimby & Broughton Moor Coal Co.*, (1898) 2 Q. B. 588, C. A.
(*b*) s. 4.
(*c*) s. 3.
(*d*) s. 6.
(*e*) s. 8.
(*f*) 38 & 39 Vict. c. 90, s. 10.
(*g*) *Morgan* v. *London General Omnibus Co.*, (1884) 13 Q. B. D. 832.
(*h*) *Hunt* v. *Great Northern R. Co.*, (1891) 1 Q. B. 601.
(*i*) *Bound* v. *Lawrence*, (1892) 1 Q. B. 226.
(*k*) *Cook* v. *North Metropolitan Tramways Co.*, (1887) 18 Q. B. D. 683.
(*l*) Seamen engaged in their ordinary

person who is engaged on, or in, or about (*a*) an employment to which "these Acts apply" (*b*), whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing.

The scope of the employments comprised within the purview of these Acts includes "any person (male or female (*c*)) employed on or in or about a railway (*d*), factory (*e*), mine (*f*),

duties on board a vessel in dock are not "workmen" for the purposes of the Act: *Griffin* v. *Houlder Line, Ltd.*, (1905) A. C. 220; *Owens* v. *Campbell*, 1904) 2 K. B. 60, C. A.; *Corbett* v. *Pearce*, (1904) 2 K. B. 422. Neither is the certificated manager of a coal mine, receiving a yearly salary (*Simpson* v. *Ebbw Vale Steel, Iron & Coal Co.*, (1905) 1 K. B. 453), nor one of the partners in a mining firm who, by arrangement with his co-partners, acted as working foreman of the mine (*Ellis* v. *Joseph Ellis & Co.*, (1905) 1 K. B. 324, C. A.).

(*a*) For definitions of engagement "on, or in, or about," see *Owens* v. *Campbell*, (1904) 2 K. B. 60, C. A.; *Andrews* v. *Failsworth Industrial Society, Ltd.* (*Injury by Lightning*), (1904) 2 K. B. 32, C. A.; *Blovett* v. *Sawyer* (*Injury during Dinner-hour*), (1904) 1 K. B. 271, C. A.; *Brinton's, Ltd.* v. *Turvey* (*Death from Anthrax*), (1905) A. C. 230; *Mackenzie* v. *Coltness Iron Co., Ltd.* (*Miner going to Work*), (1903) 6 F. 8, Ct. of Sess.; *McIntyre* v. *Bodger* (*Struggle between Workmen for Possession of Tool*), (1903) 6 F. 176, Ct. of Sess.; *Rogers* v. *Mayor, &c., of Cardiff* (*Accident while proceeding from one place of repair* (*electric wire*) *to another*), (1905) 22 T. L. R. 22; see also *Fenn* v. *Miller*, (1900) 1 Q. B. 788; *Woodham* v. *Atlantic Transport Co.*, (1899) 2 Q. B. 15; *Cosgrave* v. *Anglo-American Oil Co.*, (1900) 34 Ir. L. T. R. 56, C. A. Engagement *not* "on, or in, or about": *Benson* v. *Lancashire & Yorkshire R. Co.*, (1904) 1 K. B. 242, C. A.; *Back* v. *Dick, Kerr & Co.*, (1905) 2 K. B. 148, C. A.; *Spacey* v. *Dowlais Gas & Coke Co., Ltd.*, (1905) 22 T. L. R. 29.

(*b*) And see "Chitty on Contracts," 14th ed.

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 1, subs. 1).

(*d*) The term "railway," by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48, s. 3), applies only to a railway constructed or carried on under the powers of an Act of Parliament. A tramway, laid along a public road, and similarly authorised, is also included (*Fletcher* v. *London United Tramways Co., Ltd.*, (1902) 2 K. B. 269, C. A.).

(*e*) For definitions of "factory" and "workshop," see 1 Edw. VII. c. 22, s. 149, and schedule 6. The term "factory" also includes every laundry worked by steam, water, or other mechanical power, and any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. This Act is now repealed, with the exceptions of s. 12, subs. 3 of s. 24, and s. 28, and replaced by the Factory and Workshop Act, 1901. For judicial decisions as to what is a "factory" for the purposes of this Act, see *Barrett* v. *Kemp Bros.*, (1904) 1 K. B. 517; *Kavanagh* v. *Caledonian R. Co.*, (1903) 5 F. 1128, Ct. of Sess.; *Green* v. *Britten and Gilson*, (1904) 1 K. B. 350; *Dyer* v. *Swift Cycle Co.*, (1904) 2 K. B. 36; *Brass* v. *London County Council*, (1904) 2 K. B. 336; *Houlder Line* v. *Griffin*, (1905) A. C. 220.

(*f*) For statutory meaning of "mine," see 35 & 36 Vict. c. 77, s. 41, and 50 & 51 Vict. c. 58, s. 75. "Pit banks" are factories within 1 Edw. VII. c. 22, sched. 6, clause 27; and see *Anderson*

quarry (*a*), or engineering work (*b*), and to employment by the undertakers (*c*), on or in or about any building which exceeds thirty feet in height (*d*), and is either being constructed or repaired by means of a scaffolding (*e*), or being demolished, or on which machinery driven by steam, water, or other mechanical power (*f*) is being used for the purpose of the construction, repair, or demolition thereof." It also applies "to the employment of workmen in agriculture (*g*), by any employer (*h*), who habitually

v. *Lochgelly Iron and Coal Co., Ltd.*, (1904) 7 F. 187, Ct. of Sess.

(*a*) For definition of "quarry," see 57 & 58 Vict. c. 42, s. 1, and *Scott* v. *Midland Ry.*, (1901) 1 Q. B. 317.

(*b*) "Engineering work" means any work of construction, or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or mechanical power is used; and see *Coles* v. *Anderson*, (1905) 69 J. P. 201; *Adams* v. *Shaddock*, (1905) 22 T. L. R. 15, C. A. For rule as to area of work, see *Atkinson* v. *Lumb*, (1903) 1 K. B. 861, C. A. The term, however, does not apply to work done at a distance, ancillary to the principal object of the undertaking (*Chambers* v. *Whitehaven Harbour Commissioners*, (1899) 2 Q. B. 132, C. A.).

(*c*) In the case of "engineering work," the "undertaker" is the person (including any body of persons corporate or unincorporate, 52 & 53 Vict. c. 63, s. 19) undertaking the construction, alteration, or repair, and in the case of a building, the person undertaking the construction, repair or demolition. In the case of a railway, the phrase implies the railway company; when applied to a factory, quarry, or laundry the occupier thereof, within the meaning of the Factory and Workshops Acts, 1878—1895; and in the case of a mine, the owner thereof within the meaning of 35 & 36 Vict. c. 77, s. 41, and 50 & 51 Vict. c. 58, s. 75. The Act 60 & 61 Vict. c. 37, s. 8, include the Crown in the term "undertaker" in any employment other than the naval and military services. For other definitions of "undertakers," see *McCabe* v. *Jopling*, (1904) 1 K. B. 222; *Wearings* v. *Kirk and Randall*, (1904) 1 K. B. 213; *Houlder Line* v. *Griffin*, (1905) A. C. 220; *Ramsay* v. *Mackie*, (1904) 7 F. 106, Ct. of Sess.

(*d*) For definitions of "building" for the purposes of the Act, see *Aylward* v. *Matthews*, (1905) 1 K. B. 343, C. A.; *Plant* v. *Wright*, (1905) 1 K. B. 353, C. A.; *Hartley* v. *Quick*, (1905) 1 K. B. 359.

(*e*) For definition of "scaffolding" see *Hoddinott* v. *Newton, Chambers & Co.*, (1901) A. C. 49; *Crowther* v. *West Riding Window Cleaning Co.*, (1904) 1 K. B. 232; *Campbell* v. *Sellars*, (1903) 5 F. 900, Ct. of Sess.; *O'Brien* v. *Dobbie*, (1905) 1 K. B. 346.

(*f*) "Other mechanical power" must be construed *ejusdem generis* with steam, water, electricity, &c. (*Wilmot* v. *Paton*, (1902) 1 K. B. 237).

(*g*) The expression "agriculture," for the purposes of the Act, include horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live-stock, poultry or bees, and the growth of fruit and vegetables (63 & 64 Vict. c. 22, s. 1, subs. 3). As to who is a "workman" in agriculture see *Smith* v. *Coles*, (1905) 22 T. L. R. 5, C. A.

(*h*) The term "employer" includes any body of persons corporate or unincorporate, and the legal personal representatives of a deceased employer.

employs one or more workmen in such employment." Moreover, upon the death of a workman, by an accident which would have entitled him to compensation had he recovered, the right of damages or "solatium" (*a*), survives to his "dependents" (*b*).

As may be anticipated, the complex character of the sections quoted above, which are, to some extent, typical of the remaining clauses of the Act, has led to endless litigation, especially as the principle underlying the Act imports into British law the novel doctrine that an employer of labour, apart from personal or constructive negligence, is a compulsory insurer, against accident, of the workmen employed by him; provided that the injury is not of such a trivial character as merely to disable the workman from earning full wages for a less period than two weeks, or that the accident was not primarily occasioned by the "serious and wilful misconduct of the workman" (*c*) himself.

Apart from these provisoes, upon condition that notice of the accident is given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, "in any employment to which these Acts apply (*d*);" the employer is liable to pay compensation to the workman, in accordance with the First Schedule appended to the Act of 1897, upon the happening of any personal injury by accident arising out of and in the course of his employment (*e*),

(*a*) For principle of calculation where survivor is only partially dependent see *Osmond* v. *Campbell and Harrison*, (1905) 22 T. L. R. 4, C. A.

(*b*) For definition of "dependents" see 60 & 61 Vict. c. 37, s. 7, subs. 3 (*The Main Colliery Co.* v. *Davies*, (1900) A. C. 358; and *Howells* v. *Vivian*, (1902) 85 L. T. 529); *Turners, Ltd.* v. *Whitefield* (woman living apart from husband), (1904) 6 F. 922, Ct. of Sess.; *Sneddon* v. *Addie* (deserted wife), (1904) 6 F. 992, Ct. of Sess.; *Coulthard* v. *The Consett Iron Co., Ltd.* (husband living apart from wife), (1905) 22 T. L. R. 25.

(*c*) "Wilful misconduct" may apparently consist either of acts of omission or commission (see *Lewis* v. *Great Western R. Co.*, (1877) 3 Q. B. D. 195, at p. 201. For cases under the Act, see *John* v. *Albion Coal Co.*, (1901) 18 T. L. R. 27, C. A.; *Lowe* v. *Pearson*, (1899) 1 Q. B. 261, C. A.; *Reeks* v. *Kynoch*, (1901) 18 T. L. R. 34, C. A. Note also *Logue* v. *Fullarton*, (1901) Sc. 3 F. (5th ser.) 1006, at p. 1009; *Lynch* v. *Baird*, (1904) 6 F. 271, Ct. of Sess.; *Condron* v. *Gavin Paul & Sons, Ltd.*, (1903) 6 F. 29, Ct. of Sess.; *United Collieries Co.* v. *McGhie*, (1904) 6 F. 808, Ct. of Sess.; *Powell* v. *Lanarkshire Steel Co.*, (1904) 6 F. 1039, Ct. of Sess.

(*d*) As to "failure to give notice as soon as practicable," see *Rankine* v. *Alloa Coal Co.*, (1904) 6 F. 375, Ct. of Sess.

(*e*) "Course of employment" (*McNicholas* v. *Dawson*, (1899) 1 Q. B. 773; *Goodlet* v. *Caledonian R. Co.*, (1902) 39

Where the injury is caused by the personal negligence, or wilful act of the employer (*a*), or of some person for whose act or default the employer is responsible, the workman has an alternative course of action, it being provided that nothing in the Workmen's Compensation Acts, 1897 and 1900, shall affect any civil liability of the employer either at common law or by statute (Employers' Liability Act, 1880). Consequently, under the circumstances mentioned above, the workman may, at his option, either claim compensation under the Workmen's Compensation Acts of 1897 and 1900, or take the same proceedings as were open to him before the commencement of these Acts. Nor does an unsuccessful action, either at common law or under the provisions of the Employers' Liability Act, 1880, deprive a plaintiff of his remedies under the later statutes, or *vice versâ* (*b*).

And, in the case of an infant, the Act, though including apprentice in the generic term "workman," does not thereby alter the law applicable to contracts made by infants, or, in the case of a claim originally made under the Act, bar the bringing of a subsequent action for negligence (*c*).

It being expressly provided by subs. 4 of s. 1 of the Act of 1897, that if within the *statutory limit of six months* (s. 2, subs. 1) "an action is brought to recover damages independently of this Act, for injury caused by any accident, and it is determined in such action, that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose,

Sco. L. R. 759; *Proctor* v. *Cumisky* (1904) 6 F. 832, Ct. of Sess.; *Wilkes* v. *Dowell*, (1905) 2 K. B. 225, C. A.; *Challis* v. *London & South-Western R. Co.*, (1905) 2 K. B. 1540, C. A.; *Sharp* v. *Johnson*, (1905) 2 K. B. 139, C. A.; *Brintons* v. *Turvey*, (1905) A. C. 230; *Steel* v. *Cammell, Laird & Co., Ltd.*, (1902) 2 K. B. 232, C. A.: *Morris* v. *Mayor, &c., Lambeth* (watchman in shanty on highway), (1905) 22 T. L. R. 22). But where an accident occurs through the tortious act of a fellow-workman, it is not in the "course of employment" (*Armitage* v. *Lancashire & Yorkshire R. Co.*, (1902) 2 K. B. 178); but see *McIntyre* v. *Bodger* (1904) 6 F. 176, Ct. of Sess.

(*a*) For illustrative case of "negligence of master," see *Groves* v. *Wimborne* (*Lord*), (1898) 2 Q. B. 402, C. A.

(*b*) *Rouse* v. *Dixon*, (1904) 2 K. B. 628, C. A.

(*c*) *Stephens* v. *Dudbridge Ironworks Co., Ltd.*, (1904) 2 K. B. 225.

proceed to assess such compensation," but shall be at liberty to penalise the plaintiff by deducting from such compensation all the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. Section 4 of the Act provides that persons being themselves "undertakers" (that is, persons carrying on a trade or business within the meaning of the Acts) shall, in case of an accident, be personally responsible to the workmen of any sub-contractor whom they may employ to carry on any part of their *particular* business on their behalf (even though such sub-contractor may not himself be an "undertaker" within the meaning of the Act) (*a*), provided that the work undertaken by the sub-contractor is identical in character with the business which the original undertaker carries on, and is not merely ancillary or incidental thereto (*b*). Where (s. 6) the injury in respect of which compensation is recoverable was caused under circumstances creating a legal liability in a third party, the workman may, at his option, proceed alternatively, either at law against such third party to recover damages, or against his employer under the Act, but not against both. It has, moreover, been held that the word "employer," and the word "undertaker" are for the purposes of this section of the Act interchangeable. Consequently a sum received by way of quittance in full, of all claims against one defendant, though accepted with a specific reservation of all rights of action against other parties, effectually bars any further ground of action (*c*). Should, however, the workman proceed under the Act and recover compensation, the employer is entitled to be indemnified by the actual committer of the wrongful act (*d*).

By the Shipowners' Negligence (Remedies) Act, 1905 (*e*), which enlarges the remedies of persons injured by the negligence of shipowners, it is provided (s. 1, subs. 4) that, "an

(*a*) As to when a sub-contractor may be an "undertaker," see *Cooper & Crane* v. *Wright*, (1902) A. C. 302.

(*b*) *Pearce & Son* v. *London & South Western Ry.*, (1900) 2 Q. B. 100.

(*c*) *Murray* v. *North British R. Co.*, (1904) 6 F. 540, Ct. of Sess.

(*d*) *Topping* v. *Rhind*, (1904) 6 F. 666, Ct. of Sess.; *Evans* v. *Cook*, (1905) 1 K. B. 53, C. A.; see also *Great Northern R. Co.* v. *Whitehead & Co.*, Times Newspaper, August 9th, 1902.

(*e*) 5 Edw. VII. c. 100. (This Act comes into force on January 1st, 1906.)

employer who has paid compensation, or against whom a claim for compensation has been made under the Workmen's Compensation Act, 1897, as amended by any subsequent enactment," shall be entitled to avail himself of any of the provisions of the Act.

In event of an employer's bankruptcy, liability for compensation under the Act is a first charge on such employer's estate, and where the employer has insured against liability, the insurers shall, notwithstanding his bankruptcy, upon the direction of the Judge of the County Court, pay into the Post Office Savings Bank, in the name of the registrar of the Court, any sum that may be allotted to the injured workman as compensation.

Independent contractors.

A principal who procures work to be done for him by an independent contractor, by an agent that is to say over whom he reserves no power of control, is, in general, and subject to four classes of exceptions to be presently noted, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. And in this respect the servants of the contractor, whilst acting as such, stand in the same position as their master, so that the employer of the contractor is not liable for the torts committed by the contractor's servants (*a*), although, as will be subsequently shown, recent judicial decisions have considerably limited the application of this general proposition. Thus one who jobs horses to be driven by the jobmaster's servant is not responsible for the negligence of the driver (*b*). But in such cases nice questions sometimes arise as to whether the servant was acting as the servant of the contractor or of his employer. Thus in *Jones* v. *Scullard* (*c*), where the coachman was paid by the job-master, but the livery and the horse as well as the carriage were provided by the hirer, it was held that the latter and not the job-master was responsible for an accident occasioned by negligent driving. The test in these cases is not which party pays the servant for the work done (*d*); many

Employer of contractor not liable for torts of contractor's servants.

(*a*) *Milligan* v. *Wedge*, (1840) 12 A. & E. 737.

(*b*) *Per* Littledale, J., *Laugher* v. *Pointer*, (1826) 5 B. & C. 547; *Quarman* v. *Burnett*, (1840) 6 M. & W. 499. As to when the master of a tug is to be treated as the servant of the owner of the vessel towed, see *The Quickstep*, (1890) 15 P. D. 196.

(*c*) (1898) 2 Q. B. 565, C. A.

(*d*) *Quarman* v. *Burdett*, *supra*.

classes of servants, such, for instance, as waiters and ostlers, as a general rule receive no wages from their masters, and are dependent for their remuneration upon the gratuities they receive from their masters' customers, but that fact does not make them, for the time being, the servants of the customers. Nor is it material that the employer selected the particular servant from amongst the contractor's staff of servants (*a*). Nor does it affect the question that by the terms of the contract between the employer and the contractor the former should have the power of dismissing the servant for incompetence (*b*). The true test is whether the employer intended to have a power of controlling the servant supplied by the contractor, and of regulating the manner in which he did his work. Thus, where a local authority contracted with A. to supply a driver and horse to draw their watering cart, and A. selected and paid the driver, and the driver was not under the control or direction of the local authority otherwise than that they directed him what streets to water, they were held not liable for injuries caused by the negligence of the driver whilst engaged in driving their cart (*c*). So, too, where the owners of a mine employ a contractor to sink a shaft, they providing and placing at the disposal of the contractor the necessary engine with an engineer to work it, and such engineer, who was selected and paid by the owners, was by the terms of the contract, placed entirely under the control of the contractor, the owners were held not liable to a person who was injured by the negligence of the engineer, whilst so acting under the contractor's control, on the ground that he was for the time being the servant of the contractor and not of the owners (*d*). "Where one person lends his servant to another for a particular employment the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him" (*e*).

Test whether party committing the tort is the servant of the contractor or his employer.

(*a*) *Quarman* v. *Burnett*, (1840) 6 M. & W. 499.

(*b*) *Reedie* v. *London & North Western R. Co.*, (1849) 4 Exch. 244.

(*c*) *Jones* v. *Corporation of Liverpool*, (1885) 14 Q. B. D. 890; but see *Mileham* v. *Corporation of Marylebone*, (1903) 67 J. P. 110.

(*d*) *Rourke* v. *White Moss Co.*, (1877) 2 C. P. D. 205.

(*e*) *Per* Cockburn, C.J., *ibid.*, p. 209. And see *Johnson* v. *Lindsay*, (1891) A. C. 371; *Donovan* v. *Laing*, (1893) 1 Q. B. 629.

But although where a party, who is not under a statutory obligation to do the work, employs a contractor to do work by himself and his servants, and under the contract it is intended that the employer shall not exercise any control over the servant supplied by the contractor, the employer is not liable for the tortious act of the servant while engaged on the work if he suffer him to do it in his own way, it is otherwise if he interferes with the servant and in fact exercises control over him and directs him to do the work in a particular manner. In such case, if the direction be given, not as mere advice, but as an order, and the servant obey it and injury result therefrom, the employer will be liable (*a*), and the contractor will not, on the ground that the servant in obeying the direction acted for the moment as the servant of the party giving it and not of his real master. If the employer is liable the contractor is not, and *vice versâ*, for a man cannot at one and the same time serve two masters. "He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognise a several liability in two principals who are unconnected" (*b*).

Exception to the general rule that an employer is not liable for the negligence of the contractor or of his servants.

To the general rule that an employer is not liable for the negligence of an independent contractor or his servants there are four exceptions:—

1. Where the act which the contractor is employed to do is one which, if done by the employer, would, though lawful in itself, be done at his peril. 2. Where the contractor is employed to execute certain work which the employer is under positive statutory obligation to execute. 3. Where the work which the contractor is employed to do is, on the face of it, unlawful. 4. Where a person (including a corporation) employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public. In each of these four classes of cases it is obvious that the employer cannot free himself from liability merely by

(*a*) *McLaughlin* v. *Pryor*, (1842) 4 M. & G. 48. This seems to be the meaning of the decision in this case as interpreted in subsequent cases, though the judgments indeed seem to suggest that where the employer sees the contractor's servant misconducting himself, mere non-protest will render him liable.

(*b*) *Per* Littledale, J., *Laugher* v. *Pointer*, (1826) 5 B. & C. p. 558. And as to right of action, see *Cross* v. *Matthews*, (1904) 91 L. T. 500.

employing a contractor to do the work for him. And it is believed that all the cases in which an employer has been held responsible for the negligence of a contractor may be referred to one or other of those four exceptions. The last of these exceptions is an amplification of the rule laid down in the case of *Bower* v. *Peate* (*a*), that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful" (*b*).

Rule in *Bower* v. *Peate* discussed.

1. The actual decision in *Bower* v. *Peate* was to the effect that where one of two adjoining houses is entitled to support from the other or from the soil underlying it, the owner of the servient tenement, if desirous of rebuilding his house and of excavating the foundations for that purpose, cannot escape responsibility for the consequences of thereby withdrawing the support to which the adjoining house is entitled, by entrusting the task of excavation and rebuilding to an independent contractor. That decision was followed by the House of Lords in *Dalton* v. *Angus* (*c*); and the same principle was applied in *Hughes* v. *Percival* (*d*), to what also was practically a case of withdrawal of support, namely, a building operation involving interference with a party-wall, whereby the party-wall was weakened and the adjoining house fell. Now it is conceived that the right of support, or rather the right of the dominant owner to have his neighbour refrain from pulling the dominant house down, is an absolute right, and that if the servient owner withdraws the support to which the other is

Where work which contractor is employed to do would, if done by employer, be done at his peril.

Withdrawal of support.

(*a*) (1876) 1 Q. B. D. 321.

(*b*) P. 326. See *The Snark*, (1900) P. 105, C. A.; *Penny* v. *Wimbledon Urban Council*, (1898) 2 Q. B., Bruce, J., at p. 217, affirmed, (1899) 2 Q. B. 72; *Hill* v. *Tottenham Urban District Council*, (1898) 79 L. T. 495.

(*c*) (1881) 6 App. Cas. 746.

(*d*) (1883) 8 App. Cas. 443, overruling *Butler* v. *Hunter*, (1862) 7 H. & N. 826. The case of removal of support afforded by a party-wall to a modern house seems to stand on the same footing as the removal of support afforded by soil to an ancient one. See *Richards* v. *Rose*, (1854) 9 Exch. p. 221.

entitled he does so at his peril (*a*). In the last-mentioned case Lord Blackburn indeed suggests that the duty cast by law upon the servient owner in such case is not an absolute duty to provide that no damage should happen, but only a duty to see that reasonable skill and care are exercised in the operation, and Lord Fitzgerald, while admitting that the law was tending in the direction of treating parties engaged in such operations as insurers of their neighbours, thought it had not yet reached that point. These *dicta*, however, were unnecessary to the decision, and seem to be unsupported by any earlier authority; while the suggestion, which the proposition that the duty is not absolute involves, namely, that a house-owner who, knowing nothing about building, when employing a competent professional builder to rebuild his house for him, is bound to superintend the work and dictate to the builder as to how the work should be executed, is open to obvious objections.

Bringing foreign matter on to employers' land.

A person who brings and keeps upon his land some foreign matter which is likely to do damage if it escapes, does so at his peril (*b*), and consequently he cannot excuse himself for the escape on the ground that he had employed a competent contractor to place and confine the matter in the position from which it escaped; therefore, where the owner of the house employed a contractor to fix on it a lamp overhanging the footway, and in consequence of the insecureness of the fastening the lamp fell and did damage, the owner was held responsible (*c*). There is obviously *primâ facie* nothing more dangerous in the fixing of a lamp over a footway than in placing luggage on the top of an omnibus which has to pass through the crowded streets; and yet if the owner of a portmanteau deliver it to a railway company to be carried on their omnibus through the streets, and owing to its being insecurely fastened it falls and injures a passer-by, the owner will clearly not be liable. A comparison of these two cases compels to the conclusion that, in considering whether in similar cases the employer is liable for the negligence of the contractor, the true test is not whether the work that the latter is employed

(*a*) See Ch. XV. and cases there cited.
(*b*) *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330.
(*c*) *Tarry* v. *Ashton*, (1876) 1 Q. B. D. 314.

to do is *primâ facie* dangerous or not, but whether if done by the employer it would be done at his peril. A person, however, who employs a contractor to bring some foreign thing on to his land will not be responsible for its escape therefrom until he has begun to keep it, that is to say, until the contractor has parted with the possession of the thing, which will not happen until the thing has been placed in the position in which it is definitely intended to be left. Thus where a railway company employed a contractor to build a bridge, and one of the contractor's workmen dropped a stone, intended ultimately to form part of the bridge, upon a passer-by in the street below, the company were held not liable (*a*). Had the stone dropped after it had been definitely placed in position they would have been liable (*b*), for the case would have come within the principle of *Tarry* v. *Ashton* (*c*): and it is apprehended that the fact of the accident happening before the workmen had finished the job and quitted the premises would have made no difference in this respect (*d*). There is, however, no liability where a person stores a thing on his own land, using all reasonable care to keep it safely, and it escapes either by the act of God or by *vis major* (*e*).

But a landowner is responsible for the negligence of an independent contractor employed to burn scrub on his land, whereby the fire spreads to the adjoining land of the plaintiff (*f*).

Maintenance of artificial structure in public footway.

Again, the owner of an artificial structure, such as a coal-cellar, with an opening in a highway or other place over which the public have a right of passage, maintains it at his peril, and consequently if the owner of such a cellar employs a coal merchant to deliver coals into it, and the coal-merchant's servants whilst engaged in delivering them neglect to fence the opening whereby an accident happens to a passer-by, he will be liable none the less because the parties guilty of the negligence were

(*a*) *Reedie* v. *London & North Western R. Co.*, (1849) 4 Exch. 244.

(*b*) Assuming, that is to say, that the bridge was not built under statutory powers. See Ch. XIV.

(*c*) (1876) 1 Q. B. D. 314.

(*d*) By analogy to the cases of withdrawal of support, and *Pickard* v. *Smith*, (1861) 10 C. B. N. S. 470, the coal-cellar case, in both of which the workmen were still engaged on the job.

(*e*) *Nichols* v. *Marsland*, (1876) 2 Ex. Div. 1, C. A.

(*f*) *Black* v. *Christchurch Finance Co.*, (1894) A. C. 48.

the servants of an independent contractor (*a*); for the duty to fence the hole securely is an absolute duty (*b*). Nor will a plea of contributory negligence or trespass avail when the accident befalls a child of tender years (*c*).

It was at one time thought that the obligations attaching to the ownership of fixed property were such as to render the owner liable for *any* act of negligence on the part of a contractor's workmen who were engaged in work upon the premises for the owner's benefit. Thus, in *Bush* v. *Steinman* (*d*), where the defendant employed a contractor to repair his house adjoining a high road, and a contractor's workmen left a pile of lime on the roadway, whereby the plaintiff's carriage driving against the heap was overturned and injured, it was held that the defendant was liable. And in *Laugher* v. *Pointer* (*e*), Littledale, J., suggested that "in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors and their servants." This extreme doctrine, however, was in *Reedie* v. *London & North Western R. Co.* (*f*) denied to be law, and *Bush* v. *Steinman* was there overruled. It has, however, been subsequently re-affirmed by the Court of Appeal in *Penny* v. *Wimbledon Urban District Council* (*g*).

And a similar doctrine was laid down in the case of *The Snark* (*h*), in which it was held by Barnes, J., that the owner of a sunken vessel, in the tide-way, which he had not abandoned, was liable for the neglect of a contractor to whom he had deputed the duty of marking her position.

Consequently, the decision of the Court, in favour of the defendant, in the earlier case of *Knight* v. *Fox* (*i*), where the defendant, a contractor employed to build a bridge over a railway,

(*a*) *Pickard* v. *Smith*, (1861) 10 C. B. N. S. 470; and see *Holliday* v. *National Telephone Co.*, (1899) 2 Q. B. 392.

(*b*) *Lawrence* v. *Jenkins*, (1873) L. R. 8 Q. B. 274. See below, Ch. XV.

(*c*) *Harrold* v. *Watney*, (1898) 2 Q. B. 320; *Cummings* v. *Darngavil Coal Co.*, (1903) 5 F. 513, Ct. of Sess.; but see *Hughes* v. *Macfie*, (1863) 2 H. & C. 744, Ex.

(*d*) (1799) 1 B. & P. 404.

(*e*) (1826) 5 B. & C. p. 560.

(*f*) (1849) 4 Exch. 244.

(*g*) (1899) 2 Q. B. 72.

(*h*) *The Snark*, (1899) P. 74.

(*i*) (1850) 5 Exch. 721.

employed a sub-contractor to erect a scaffolding for that purpose, and the sub-contractor's workmen improperly caused a pole of the scaffolding to project over the footway, whereby the plaintiff fell over the pole in the dark and was injured, can no longer be regarded as good law. But the distinction between fixed and moveable property, as regards the obligations respectively attaching to their ownership, nevertheless holds good in respect of the two classes of cases coming within the principles of *Tarry* v. *Ashton* and *Pickard* v. *Smith* (*a*).

of beasts, fire, and explosives.

Although in general the owner of moveable property which escapes from some place elsewhere than his own land and does damage is not liable in the absence of negligence (*b*), it is otherwise in the case of beasts *feræ naturæ*, in the case of fire, such as that of locomotive engines, and probably also in the case of explosives (*c*); moveables of such description the owner apparently keeps at his peril, not merely when they are on his land, but whatever the place from which they escape may be. Therefore it is apprehended that if the owner of a savage beast employ a contractor, such as the Zoological Society, to keep the beast for him, and through the negligence of the contractor's servants it escapes, the owner would on principle be liable; and similarly a consignor of nitro-glycerine or some other unstable explosive by railway would presumably be liable if an explosion occurred while the goods were *in transitu;* but these questions have never yet directly arisen for decision (*d*).

Where contractor employed to execute work which employer is under statutory obligation to execute.

2. The second class of cases in which an employer is liable for the negligence of a contractor is, as above stated, where the employer, being under a statutory obligation to do some particular act, has delegated the performance of his duty to the contractor, and the contractor has failed to perform it (*e*). Thus where a statute imposed a duty upon the defendants of making a bridge that would open in a particular way, and they employed a contractor who made a bridge that would not open in the manner

(*a*) pp. 106 and 107, *supra*.

(*b*) See, however, *Snee* v. *Durkie*, (1903) 6 F. 42, Ct. of Sess.

(*c*) See Ch. XV.

(*d*) *Farrant* v. *Barnes*, (1862) 11 C. B. N. S. 553; *East India R. Co.* v. *Kalidas Mukerjee*, (1901) A. C. 396, P. C.

(*e*) *À fortiori* the same rule, as to liability, applies where the particular act complained of was not necessarily ancillary to, but in excess of, the statutory powers, *Tilling, Ltd.* v. *Dick, Kerr & Co.*, (1905) 1 K. B. 562.

equired, they were held to be nevertheless responsible for the non-discharge of their duty (*a*). Similarly, where the defendants, being empowered by statute to make a drain across a highway, but being also required by the same statute to reinstate the road properly after the drain was made, employed a contractor to do the work, who neglected to reinstate the road properly, whereby damage happened, the defendants were held liable (*b*), it being 'an implied condition of statutory powers that, when exercised at all, they shall be executed with due care" (*c*).

The Court in that case also intimated that even if there had not been an express provision in the statute requiring the defendants to properly reinstate the road, they would still have held them liable, upon the ground that there was also an *implied* statutory obligation to do it, for that a section which authorises the making of a drain implies that the duty to fill it up is also imposed (*d*). It was apparently upon this principle that Lindley and Rigby, L.JJ., proceeded in the case of *Hardaker* v. *Idle District Council* (*e*). There the defendants being about to construct a sewer in a street under powers conferred upon them by the Public Health Act, 1875, employed a contractor to construct it for them. In order to execute the work he had to remove the soil under a gas-pipe. Owing to his neglect to securely pack the soil under the gas-pipe after the sewer was made, the gas-pipe broke, whereby the gas escaped into the plaintiff's house and there exploded. The defendants were held responsible (*f*).

3. The third class of cases is where the contractor is employed to do some work which is altogether unlawful in itself. If, as

Where contractor employed to do something *per se* unlawful.

(*a*) *Hole* v. *Sittingbourne R. Co.*, (1861) 6 H. & N. 488.

(*b*) *Gray* v. *Pullen*, (1864) 5 B. & S. 970; cp. *Peachey* v. *Rowland*, (1853) 13 C. B. 182; and see *Shoredith Corporation* v. *Bull*, (1904) 90 L. T. 210, H. L.

(*c*) *Sanitary Commissioners of Gibraltar* v. *Orfila*, (1890) 15 App. Cas. 400, at p. 411.

(*d*) See *per* Erle, C.J., 5 B. & S. p. 984.

(*e*) (1896) 1 Q. B. 335.

(*f*) Rigby, L.J., while holding that the defendants were liable even on the assumption that the person whose negligence was complained of was a contractor, was of opinion that his relation to the defendants was, in fact, that of a servant. Smith, L.J., agreed with Lindley, L.J., in holding that the negligent person was a contractor, but he held the defendants liable upon a different ground; he apparently assented to the distinction between employment to do work which is, and employment to do work which is not, *primâ facie* dangerous, and cited with

incidental to the execution of such work, the contractor's servants be guilty of some negligence, the employer will be responsible. Thus, where a gas company, who had no statutory powers (*a*) to take up the streets for the purpose of laying their gas-pipes, employed a contractor to take up the surface of the streets and lay their pipes for them, and the contractor's servants having laid their pipes, insufficiently reinstated the surface whereby damage happened, the gas company were held liable (*b*); and a similar rule applies where the act complained of resulted from work done in excess of, and not ancillary to, the statutory powers (*c*).

4. The fourth class of cases in which an employer cannot divest himself of liability for the torts of a third party is, as before stated, when a person, or a body of persons, employs an independent contractor to do a description of work, for him or them, in a public place, that is likely—in the absence of necessary precautions—to prove dangerous to a member of the public at large (*d*).

But where the act which the contractor is employed to do belongs to none of the four above classes of cases the employer is not liable for the contractor's negligence.

Ratification of torts.

A person may be liable for the tort of another, even though at the time of the tort committed he did not stand to him in the relation of principal to agent, if the tort was committed on his behalf and in his name, and he subsequently ratified it. "By the common law he that receiveth a trespasser and agreeth to a trespass after it be done is no trespasser, unless the trespass was done to his use or for his benefit, and then the agreement

approval the rule as stated in *Bower* v. *Peate*. The objection to holding that the defendant's breach of their implied statutory duty could render them liable to the plaintiff for the particular damage that occurred, was that that duty was presumably only owed to members of the public as passengers along the highway, and upon that ground it may perhaps be difficult to justify the decision. Smith, L.J., seems to have felt this difficulty, and it may have been because he did so that he was led to base his judgment upon different grounds.

(*a*) This seems to have been assumed by the Court.

(*b*) *Ellis* v. *Sheffield Gas Co.*, (1853) 2 E. & B. 767.

(*c*) *Tilling, Ltd.* v. *Dick, Kerr & Co.*, (1905) 1 K. B. 562.

(*d*) *Hill* v. *Tottenham Urban District Council*, (1898) 79 L. T. p. 495; *Mileham* v. *Corporation of Marylebone*, (1903) 67 J. P. 110.

subsequent amounteth to a commandment, for in that case *omnis ratihabitio retrotrahitur et mandato æquiparatur*" (*a*). Thus where a sheriff's officer acting under a valid process seizes the wrong person's goods, the party who delivered the writ to the sheriff can by subsequently assenting to such seizure render himself liable for it in trespass, although the sheriff in seizing goods purports to act as the agent of the Court and not of the party delivering the writ (*b*).

But there can be no ratification unless the party on whose behalf the acts complained of were done "ratified the acts of the agents with knowledge that they did them not according to authority, or unless he meant to take upon himself, without enquiry, the risk of any irregularity which they might have committed, and to adopt all their acts" (*c*). Therefore where, in an action of trespass against a landlord, it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture, and paid the proceeds to the defendant, who received them without enquiry, but without knowledge that anything irregular had been done, it was held that the receipt of proceeds did not amount to a ratification (*d*). So, where a railway company's inspector arrested a passenger on a charge of travelling without a ticket and took him before a magistrate, the fact of the company's attorney appearing to support the charge was, in the absence of any evidence that he or the company knew that the inspector had proceeded by arrest instead of summons, held to be no evidence of ratification by the company of the arrest (*e*). The fact that a party, who is sued for trespass committed by one purporting to act on his behalf, has offered a compromise, is no evidence of ratification (*f*).

(*a*) 4 Inst. p. 317.

(*b*) *Carter* v. *Vestry of St. Mary Abbot's, Kensington*, (1900) 64 J. P. 548, C. A.

(*c*) *Per* Paterson, J., *Freeman* v. *Rosher*, (1849) 13 Q. B. p. 798; the agent is, however, liable to the third party on the ground of misrepresentation of authority (*Salvesen* v. *Oscar II. (Owners)*, (1905) A. C. 302).

(*d*) *Freeman* v. *Rosher*, (1849) 13 Q. B. 780; *Lewis* v. *Read*, (1845) 13 M. & W. 834. It must be assumed that in these cases there was no notice to the defendant of the illegality before action brought, for it could hardly be contended that the act of retaining the proceeds after notice was not a ratification, even though the original receipt was innocent.

(*e*) *Eastern Counties R. Co.* v. *Broom* (1851) 6 Exch. 314.

(*f*) *Roe* v. *Birkenhead, &c., R. Co.*, (1851) 7 Exch. 36.

Where a person ratifies the act of one who, though without authority, professed to act as his agent, such ratification will usually relate back to the time of the act done, so that if the act was one which, though unlawful if done without the authority of the principal, might have been lawfully done with such authority, the effect of ratification will be to divest the plaintiff of the cause of action which till then he has got against the professed agent (*a*). Where one professes to distrain as bailiff for another "it is sufficient for the defendant in his cognisance to say generally 'as bailiff of J. S.' without showing his authority, and a subsequent agreement by J. S. to the distress amounts to an authority as much as if he had previously directed the defendant to distrain" (*b*). And this holds good equally whether the principal be a subject of the Crown (*c*). Similarly ratification by the plaintiff of the act of a professed agent may deprive the defendant of a vested defence. Thus if one person without authority issues a writ on behalf of another in order to prevent the operation of a Statute of Limitations, and that other ratifies his act after the time limited by the statute has expired, the effect will be to divest the defendant of the defence that till then he had got that the Statute of Limitations had run (*d*).

Liability of agent.

An agent who directly commits a tort is always personally liable; he cannot justify himself by pleading the authority or direction of his principal. And this even holds good where the principal is the Crown itself, for the maxim that the Crown can do no wrong affords no protection to its agents (*e*).

(*a*) But see *Bird* v. *Brown*, (1850) 4 Ex. 786.

(*b*) *Potter* v. *North*, (1669) 1 Wms. Saund. 347 (c), note 4. See, too, *Whitehead* v. *Taylor*, (1839) 10 A. & E. 210.

(*c*) *Buron* v. *Denman*, (1848) 2 Exch. 167.

(*d*) See *Shaw, Saville & Albion Co.* v. *Timaru Harbour Board*, (1890) 15 App. Cas. 429, where, a colonial Court having held that ratification of notice of action after the time for giving it had expired was too late, the Privy Council, after hearing an appeal against that decision, proceeded to hear a cross appeal upon the merits, which would have been unnecessary had they thought the appeal to be ill-founded.

(*e*) See above, pp. 40–41.

CHAPTER III.

FELONIOUS TORTS.

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Duty to prosecute felon before bringing action.

WHERE an act is at once a tort and a felony or misdemeanour, it is not proper that the injured party should be allowed to pursue his own private remedy in preference to furthering the ends of public justice. He has first to do his duty by prosecuting the felon, and it is only after this has been done that he can obtain compensation in an action of tort. It was at one time supposed that there could not be a double proceeding in respect of the same act. The felony, it was said, "drowns the particular offence and private wrong" (*a*). This doctrine of the merger of the tort in the felony prevailed for a considerable time, and was apparently accepted both by Lord Eldon (*b*) and Mr. Justice Buller (*c*). However, in a very early case it was held that after a successful prosecution for felony an action of trespass might be brought in respect of the same wrong (*d*), and the rule now is that the private remedy is not merged, but is only suspended until the injured party has performed his public duty; the sole object of the law being to guard against the stifling of prosecutions (*e*). In the case of *Ex parte Ball* (*f*), the majority of the Court of Appeal hinted some doubt as to this rule, but with this exception the general current of modern authority is uniform. The difficulty arises as to the manner in which the rule is to be enforced. It is clear that where a plaintiff is able to make out a case without necessarily proving or alleging a felony, it is

Tort once supposed to be merged in felony.

Remedy now only suspended.

How duty to prosecute enforced.

(*a*) *Higgins* v. *Butcher*, (1606) Yelv. 89.

(*b*) *Cox* v. *Paxton*, (1810) 17 Ves. 329.

(*c*) *Master* v. *Miller*, (1791–3) 4 T. R. p. 332.

(*d*) *Dawkes* v. *Coveneigh*, (1652) Styles, 346.

(*e*) *Stone* v. *Marsh*, (1827) 6 B. & C. 551; *Marsh* v. *Keating*, (1833–4) 1 Bing. N. C. 198; *Wells* v. *Abrahams*, (1872) L. R. 7 Q. B. 554; *Appleby* v. *Franklin*, (1886) 17 Q. B. D. 93.

(*f*) (1879) 10 Ch. D. 667, C. A.

Defendant may not set up his own felony.

not open to the defendant to try and blacken his own character by contending that his act was in truth felonious. *Nemo allegans turpitudinem suam est audiendus* (*a*). This maxim, however, does not apply where the plaintiff's own case discloses the felony (*b*). Where it does so on the face of the pleading, the defendant was formerly allowed to demur (*c*); but this probably proceeded on the notion that the felony operated as a bar and not a suspension, and it has since been held that a statement of claim disclosing a felony as the cause of action is not demurrable (*d*). The proper course would appear to be to apply to have the action stayed. Considerable difficulty arises as to what ought to be done where the felony is for the first time disclosed on the plaintiff's evidence at the trial. In *Wellock* v. *Constantine* (*e*) the declaration alleged that the defendant assaulted the plaintiff and violated and carnally knew her. The defendant simply pleaded not guilty, and at the trial on objection taken, the judge (*f*) ruled that either the plaintiff had consented or the defendant was guilty of the felony of rape, and in neither case would an action lie; and the plaintiff consented to a nonsuit. The nonsuit was subsequently upheld (*g*). In a later case, *Wells* v. *Abrahams* (*h*), the plaintiff having recovered in trover against the defendant, a new trial was moved for on the ground that the evidence tended to prove against the latter a theft of the chattel in question in the action, and that a prosecution was in fact pending. The rule was discharged, and *Wellock* v. *Constantine* was dissented from. It was said that a judge at assize was simply a commissioner with no power to try anything but the issue on the pleadings; but the force of this argument has been

Action should be stayed where felony disclosed.

(*a*) *Stone* v. *Marsh*, (1827) 6 B. & C. p. 564.

(*b*) See *per Cur.*, *Gibson* v. *Minet*, (1791) 1 H. Bl. p. 612.

(*c*) *Cox* v. *Paxton*, (1810) 17 Ves. 329. See, too, *Higgins* v. *Butcher*, (1606) Yelv. 89.

(*d*) *Roope* v. *D'Arigdor*, (1883) 10 Q. B. D. 412. The Court considered that there was no precedent for such a demurrer, but this seems erroneous: see above. In *Midland Insurance Co.* v. *Smith*, (1881) 6 Q. B. D. 561, it was said that in order to render a statement of claim demurrable it must appear not merely that there was a felony, but that it was unprosecuted.

(*e*) (1863) 2 H. & C. 146.

(*f*) Willes, J.

(*g*) By Pollock, C.B., and Bramwell, B., Martin, B., diss. In *Ex parte Ball*, (1879) 10 Ch. D. 657, Bramwell, L.J., clearly indicates his disapproval of this case.

(*h*) (1872) L. R. 7 Q. B. 554.

taken away by the provisions of the Judicature Act (*a*), giving all judges sitting at *nisi prius* the full powers of the Court, and it would seem, therefore, that there is now no objection to a judge at the trial *staying* the action if he is fully satisfied that the case for the plaintiff discloses a felony. The question is one for himself and not for the jury (*b*). It was further suggested in *Wells* v. *Abrahams* that it is competent to the Attorney-General at any time to inform the Court if an action is depending the facts of which afford a basis for a prosecution of felony, and that the Court can thereupon stay further proceedings.

Where plaintiff is unable to prosecute.

There is no impediment in the way of a party obtaining compensation for an unprosecuted felonious act where he has failed to prosecute through no default or lack of reasonable diligence on his part, as where the alleged felon dies or escapes from jurisdiction (*c*). If a prosecutor colludes to procure the acquittal of the person whom he charges with felony, it would seem that he ought not afterwards to be allowed to maintain an action in respect of the same wrong (*d*).

Where plaintiff is not the person whose duty it is to prosecute.

There is further no impediment to a person injured by a felonious act bringing his action before prosecution, unless he is the person whose duty it was to prosecute (*e*). In *Appleby* v. *Franklin* (*f*) the plaintiff sued for the seduction of her daughter, and further alleged that the defendant had administered drugs to procure abortion. Application being made to strike out the allegation on the ground that it disclosed a felony, the Court refused, saying that the mother was under no obligation to prosecute.

If a person who has failed to prosecute becomes a bankrupt,

(*a*) 36 & 37 Vict. c. 66, ss. 29, 30, 39.

(*b*) See the Irish case, (1825) *Hayes* v. *Smith*, Sm. & Bat. 378. In another recent Irish case (*S.* v. *S.*, (1889) 16 Cox C. C. 566; *A.* v. *B.* (1889), 24 L. R. Ir. 234), the Court had before them, on an interlocutory application, the pleadings in an action which disclosed a case of unprosecuted felony. The defendant made no application for a stay, and the Court decided not to grant one of their own motion.

(*c*) *Stone* v. *Marsh*, (1827) 6 B. & C. 551; *Marsh* v. *Keating*, (1833-4) 1 Bing. N. C. 198. *Per* Baggallay, L.J., *Ex parte Ball*, (1879) 10 Ch. D. 674. As to escape, see, however, Bramwell, L.J., *ibid.* p. 675. If an indictment is preferred but not proceeded with by the direction of the judge at the trial it is enough (*Dudley & West Bromwich Banking Co.* v. *Spittle*, (1860) 1 J. & H. 14).

(*d*) *Crosby* v. *Leng*, (1810) 12 East, 409.

(*e*) *Osborn* v. *Gillet*, (1873) L. R. 8 Ex. 88.

(*f*) (1886) 17 Q. B. D. 93.

the right of action, if it passes to his trustee at all, passes free from impediment, for the trustee represents the interests of the creditors and not of the bankrupt (*a*). And the trustee by virtue of his capacity may "bring, institute or defend any action . . . relating to the property of the bankrupt" (*b*). Executors and administrators are probably in no better position than those whom they represent.

Where defendant is not the felon.

Where out of a felony a cause of action arises not merely against the felon but against some innocent third party, the claim against the latter may be pursued without a prosecution. Thus, an action of trover will lie against the innocent receiver of stolen goods, though the thief be not prosecuted (*c*). But in cases of larceny by a bailee, under s. 24 of the Sale of Goods Act, 1893, the offender's prosecution to conviction is a condition precedent to the revesting of the property in the original owner (*d*). And where the felon ought to be joined as defendant with the innocent parties, as where one partner has committed a felony in a partnership transaction, then the principle that there ought first to be a prosecution applies (*e*).

Personal representative of felon.

If a man neglect to prosecute a felon during his lifetime it would seem that he ought not to be allowed to sue his personal representatives in respect of the felony after his death, but it is clearly otherwise if the felony be not discovered during the felon's lifetime, for then there is no default (*f*).

Statute of Limitations.

Where the failure to prosecute simply operates as a suspension of the remedy, and the prosecution is not a condition precedent to the bringing the action, it follows that the Statute of Limitations begins to run from the time of the wrongful act.

The Statute does not, however, run in favour of an agent who has fraudulently appropriated the property of his principal (*g*).

(*a*) *Ex parte Ball*, (1879) 10 Ch. D. 667 ; Baggallay, L.J., diss.

(*b*) The Bankruptcy Act, 1883, s. 57, subs. 2.

(*c*) *White* v. *Spettigue*, (1845) 13 M. & W. 603. See, too, *Osborn* v. *Gillet*, (1873) L. R. 8 Ex. 88.

(*d*) In cases of fraud not amounting to felony, the goods, upon conviction of the offender, do not necessarily revest in the prosecutor. Sale of Goods Act, 1893, s. 24, subs. 2 ; and see *Rex* v. *Walker*, (1901) 65 J. P. 729.

(*e*) See *Stone* v. *Marsh*, (1827) 6 B. & C. p. 564.

(*f*) *Wickham* v. *Gatrill*, (1854) 2 Sm. & G. 353.

(*g*) *North American Land and Timber Co.* v. *Watkins*, (1904) 2 Ch. 233.

It is to be observed that there is no fetter on the right of action where the alleged tort is also a misdemeanour. The difference may possibly arise from the fact that there being no forfeiture for misdemeanours, the Crown had the less interest in enforcing their prosecution.

Torts that are misdemeanours.

CHAPTER IV.

FOREIGN TORTS.

Conditions on which foreign torts are actionable here.

TORTS committed abroad, other than injuries to interests in land, have always been triable in this country (*a*) provided they fulfilled the following two conditions. First, the wrong must be of such a character that it would have been actionable if committed here. Therefore, where a collision was caused in Belgian waters by the negligent navigation of a pilot whom by the law of Belgium the shipowner was compelled to employ, it was held that no action would lie here against the shipowner, although by the Belgian law he was responsible notwithstanding that the pilotage was compulsory (*b*). Secondly, the act must not have been justifiable by the law of the place where it was done.

Nor is action maintainable, in this country, to enforce a contract, valid in a foreign country, if such contract were procured by methods antagonistic to public policy as interpreted by English Courts of Justice (*c*). No action will lie here for an act committed in a foreign country if it either was lawful by the law of that country at the time of its commission (*d*), or was subsequently rendered lawful by relation by virtue of *ex post facto* legislation in such country (*e*). In order to found an action here, however, it is not necessary that the wrong should have been *actionable* where committed; it is sufficient if it was *unlawful* (*f*). Thus a plea to an action of assault committed at Naples that by the Neapolitan law the defendant was liable only to criminal proceedings and was not civilly answerable in damages, was held bad (*g*).

(*a*) *Mostyn* v. *Fabrigas*, (1774) 1 Cowp. 161.

(*b*) *The Halley*, (1868) L. R. 2 P. C. 193.

(*c*) *Kaufman* v. *Gerson*, (1904) 1 K. B. 591, C. A.

(*d*) *Blad* v. *Bamfield*, (1674) 3 Swanst. 604; and see *Embiricos* v. *Anglo-Austrian Bank*, (1905) 1 K. B. 677.

(*e*) *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1.

(*f*) *Machado* v. *Fontes*, (1897) 2 Q. B. 231, C. A.

(*g*) *Per* Wightman, J., *Scott* v. *Lord Seymour*, (1862) 1 H. & C. p. 234. Willes and Blackburn, JJ., were inclined to agree with him, but in their view of the case it was unnecessary to decide the point.

With regard to foreign statutes of limitations the rule is that if the foreign law touches only the remedy or procedure for enforcing the obligation it is no bar to an action in this country (*a*), but if it extinguishes the right then it is a bar here (*b*).

In the case of torts relating to land situate abroad the Common Law Courts prior to the Judicature Acts would not entertain any action (*c*), but different judges seem to have entertained different views as to the grounds of this refusal. Some thought that it turned on the technical distinction between local and transitory actions, and was a question of venue rather than of jurisdiction (*d*), while others thought that it depended on want of jurisdiction. And consequently when upon the passing of the Judicature Acts local venues were abolished (*e*), it was doubted whether the only fetter upon the trial of actions for such torts was not removed, at all events if the claim was for mere reparation in damages and no question of title was involved. But it has now been finally settled by the House of Lords that the ground upon which the Courts refused to try such action before the Judicature Acts was absence of jurisdiction, and that consequently, notwithstanding the abolition of local venues, an action to recover damages for trespass to land situate abroad will still not lie here (*f*). And it seems that this is so even though no question of title be raised. Nor will it make any difference that the tort was committed in a place where there are no regular tribunals, for, as pointed out by Lord Herschell (*g*), if such an action were allowed an owner who had been ousted from land situate in such country might, after recovering the value of the land as damages here, retake possession by force, and so get both the land and its value.

(*a*) *Huber* v. *Steiner*, (1835) 2 Bing. N. C. 202.

(*b*) *Per* Willes, J., *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. p. 29. For French Statutes of Prescription, see Code Napoleon, 2262 *et seq.*

(*c*) To this rule Lord Mansfield introduced an exception in cases of torts committed in places where there were no regular tribunals (*Mostyn* v. *Fabrigas*, (1774) 1 Cowp. p. 180). But on this point he was never followed by any other judge.

(*d*) *Per* Buller, J., *Doulson* v. *Matthews*, (1792) 4 T. R. 503, and *per* Blackburn, J., *Whittaker* v. *Forbes*, (1875) 1 C. P. D. p. 53.

(*e*) Ord. XXXVI. r. 1.

(*f*) *British South Africa Co.* v. *Companhia de Moçambique*, (1893) A. C. 602.

(*g*) *Ibid.* p. 625.

CHAPTER V.

NOTICE OF ACTION.

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Statutory authority must be strictly pursued.

IF a party seeks to justify, under the authority of a statute, an act which is *primâ facie* wrongful, he must bring himself within the strict terms of the authority which he pleads, by proving that he did the very thing which he was ordered or permitted to do, and nothing more. If he has mistaken the extent of his powers, or through some misapprehension of fact has sought to apply them in cases where the necessary conditions do not exist, or has followed a wrong procedure, however innocent his intentions or excusable his error, he is none the less liable to make compensation to the persons with whose right he has interfered. Thus an actionable offence is committed by a railway company, when a locomotive engine emits "black smoke," even though the company may have complied with statutory conditions in the construction of their locomotives (*a*).

And subsequently to January 1, 1908, a railway company, though acting under statutory powers and using all precautions, will be liable (up to 100*l.*) for damage, to agricultural land or crops, arising from sparks or cinders emitted from its locomotive engines (*b*).

However, a great variety of statutes both public and private afforded a qualified protection to persons who had committed wrongs under a mistaken notion of their powers or duties under such Acts. The protection was twofold. In the first place the period of limitation was greatly shortened; in the second it was a condition precedent to the bringing of an action that notice of action should be given, so that the wrong-doer might have an opportunity of tendering amends. A sufficient tender was a

(*a*) *South Eastern & Chatham R. Co.* v. *London County Council*, (1901) 84 L. T. 632.

(*b*) 5 Ed. VII. c. 11.

good defence to the action. Now, however, by the Public Authorities Protection Act, 1893, so much of any public general Act as provides that notice of action is to be given is repealed (*a*). But notice of action is still necessary under a great many Acts which are not public general, and therefore the topic, though far less important than formerly, has still to be considered. The cases below cited were for the most part decided on repealed sections of statutes the language of which is not always identical. They, however, illustrate the general principles on which notice of action clauses are to be construed (*b*).

Who are entitled to notice.

The enactments under consideration are "intended for the benefit of persons who intend to act right but by mistake act wrong" (*c*). It is therefore indispensable, to entitle a person acting outside his powers to notice of action, that he should at the time have believed that he was acting within them (*d*); but as to what is necessary to form the foundation of such belief there has been considerable fluctuation in the authorities. In *Kine* v. *Evershed* (*e*) it was laid down that, in order to entitle a party to notice, he must in the first place have believed that he was enforcing some definite provision of the law, and secondly, have been reasonable in so believing. It is necessary, said the Court, for defendants to show not merely a "vague opinion of their own power, but a reasonable conviction that they were enforcing the specific provisions of the law in committing the grievance complained of" (*f*). A series of cases, however, followed, which have made it settled law that a party is not disentitled to notice of action merely by the fact that he acted unreasonably (*g*).

Unreasonable conduct does not necessarily disentitle.

(*a*) 56 & 57 Vict. c. 61, s. 2. A plaintiff not giving sufficient opportunity to a defendant of tendering amends may be punished by extra costs: *ibid.* s. 1.

(*b*) As to the period of limitation, see below, p. 176.

(*c*) *Per* Abbott, C.J., *Parton* v. *Williams*, (1820) 3 B. & Ald. p. 333.

(*d*) There may indeed be cases in which a man may be actuated by malice and yet be acting in pursuance of a statute (*Kirby* v. *Simpson*, (1854) 10 Ex. 358).

(*e*) (1847) 10 Q. B. 143.

(*f*) p. 151.

(*g*) In consequence of the old doctrine about reasonableness the question of a right to notice of action was often confused with the question of reasonable and probable cause for a prosecution (see *per* Willes, J., *Chamberlain* v. *King*, (1871) L. R. 6 C. P. p. 477), and consequently sometimes treated as a question for the judge. It is now, however, in so far as it bears upon the defendant's belief, clearly a question for the jury, and is so treated in all the recent cases.

Unreasonable conduct may afford cogent evidence of a lack of good faith and honest belief, but is not otherwise material (*a*). Thus in the case of *Booth* v. *Clive*, a county court judge acted in defiance of a prohibition addressed to him, under the belief that it was his duty so to do, and he was held entitled to notice of action. In such and cognate cases it is, apparently, for the Court to decide whether notice of action is necessary (*b*), although it is for the jury to decide the question of *bona fides*, on which the defendant's right to such notice depends (*c*). In some of the judgments in these cases expressions may be found which might be quoted to prove that defendants are entitled to notice when acting on mere "vague opinion of their own power" (*d*). It is clear, however, that something more definite than this is needed. A defendant may be entitled to notice as acting under a statute of the very existence of which he was ignorant, but to be so entitled he must have believed, however mistakenly, in the existence of facts which would have justified him (*e*). "Where the question is whether a defendant is entitled to notice of action under an Act of Parliament of this nature, the proper way of leaving the question to the jury is this: 'Did the defendant honestly believe in the existence of facts which, if they had existed, would have afforded a justification under the statute?' . . . It has been contended that it is enough if the defendant *bonâ fide* thought he was acting according to law, and that it is not necessary that he should believe that he was acting under an authority conferred upon him by law. To a certain extent that argument is well founded; that is to say, in order to entitle a defendant to notice of action, it is not necessary that he should know of the existence of the particular enactment. But all difficulty is obviated by the rule of law to which I have

Party should have believed that facts existed which afforded a justification.

(*a*) *Booth* v. *Clive*, (1861) 10 C. B. 827; *Cox* v. *Reid*, (1849) 13 Q. B. 558; *Gosden* v. *Elphick*, (1849) 4 Ex. 445; *Read* v. *Coker*, (1853) 13 C. B. 850; *Wedge* v. *Berkley*, (1837) 6 A. & E. 663; *Dicta* to the contrary in *Leete* v. *Hart*, (1868) L. R. 3 C. P. 322, were explained away in *Chamberlain* v. *King*, (1871) L. R. 6 C. P. 474.

(*b*) *Kirby* v. *Simpson*, (1854) 10 Ex. 358; *Arnold* v. *Hamel*, (1854) 23 L. J. Ex. 137.

(*c*) *Roberts* v. *Orchard*, (1863) 2 H. & C. 769, at p. 774.

(*d*) See particularly *Read* v. *Coker*, (1853) 13 C. B. 850.

(*e*) *Hermann* v. *Seneschal*, (1862) 13 C. B. N. S. 392; *Roberts* v. *Orchard*, (1863) 2 H. & C. 769.

adverted" (*a*). Thus s. 103 of the Larceny Act (24 & 25 Vict. c. 96) authorises the arrest of persons found committing certain offences under the Act, and s. 113 entitled a party to notice of action for anything done in pursuance of the Act. If, therefore, an arrest was made under a belief that the person arrested was caught in the act, notice of action had formerly to be given, but if the arrest was not made until some time after the supposed offence had been committed and the supposed offender had got away, there was no right to notice of action, because the defendant could not have believed that the plaintiff was found committing the offence (*b*).

Notice where the mistake is one of law.

It is not, however, universally true that it is only where a person has acted wrongly through a mistake of fact that he is entitled to notice of action. It has been frequently decided that if a magistrate, constable, or other person invested with special powers by virtue of his office or position, mistook the extent of those powers, and consequently while intending simply to execute them, acted in a manner unauthorised by the law, he nevertheless could not be sued without due notice. And this was the case whether the mistake arose out of misinterpretation of some particular section of an Act, or a general misapprehension of the extent of power (*c*).

In *Elliot* v. *Allen* (*d*) it was indeed held that the defendants as overseers having imprisoned the plaintiff under the authority, as they supposed, of a local Act without following the prescribed procedure, were not entitled to notice as having acted in "pursuance" of the Act, and the Court distinguished *Hazeldine* v. *Grove*, where under analogous circumstances it was held that notice must be given, because in that case the defendant was entitled to notice "for anything done or omitted to be done in pursuance of this Act or in the execution of the powers and authorities under this Act." It may be doubted, however,

(*a*) *Roberts* v. *Orchard*, (1863) 2 H. & C. 769, Williams, J., at p. 774.

(*b*) *Downing* v. *Capel*, (1867) L. R. 2 C. P. 461; see, too, *Chamberlain* v. *King*, (1871) L. R. 6 C. P. 474. *Read* v. *Coker*, *supra*, in so far as it is inconsistent with these cases, would seem to be overruled.

(*c*) *Weller* v. *Toke*, (1808) 9 East, 364; *Theobald* v. *Crichmore*, (1818) 1 B. & Ald. 227; *Hazeldine* v. *Grove*, (1842) 3 Q. B. 997; *Smith* v. *Hopper*, (1847) 9 Q. B. 1005; *Selmes* v. *Judge*, (1871) L. R. 6 Q. B. 724.

(*d*) (1845) 1 C. B. 18.

whether this decision is not in effect overruled by the later cases (*a*).

It can rarely, if ever, happen that a member of the general public can be entitled to notice of action on the ground that in seeking to exercise a statutory power he went wrong through a mistake of law. He is certainly not protected by reason of entertaining a "vague opinion" that his illegal act is one in which the law will bear him out.

Mistake as to possession of office.

If a defendant is sued for an act done in the mistaken belief that he possesses the authority of an office or position not in fact belonging to him, his right to notice of action will depend upon the precise words of the statute in question. If those words give a right to notice to a certain class of persons only, a defendant cannot bring himself within their protection, simply by supposing whether through error of law or fact he belongs to that class (*b*); but if all persons acting in pursuance of the statute are entitled to notice, the expression is sufficiently wide to include the case of a defendant innocently usurping an authority or jurisdiction which he does not in truth possess. Accordingly a person acting as a magistrate without being duly appointed was held not entitled to notice of action under a statute, providing that without notice no writ should be served "on any justice of the peace for anything by him done in the execution of his office" (*c*). But where the defendants were sued for a trespass which they justified as done in the exercise of their powers as surveyors of highways, and it appeared that they had *bonâ fide* acted in that capacity although their appointment was informal, it was held that they came within the protection of a section entitling to notice "any person" sued "for anything done in pursuance of or under the authority of this Act" (*d*).

In *Lidster* v. *Borrow* (*e*), the plaintiff supposed himself to be a

(*a*) See, especially, *Smith* v. *Hopper*, *supra*, and *Selmes* v. *Judge*, *supra*, at p. 123.

(*b*) *Per* Parke, B., *Hughes* v. *Buckland*, (1846) 15 M. & W. p. 356.

(*c*) *Jones* v. *Williams*, (1825) 3 B. & C. 762.

(*d*) *Huggins* v. *Waydey*, (1846) 15 M. & W. 357; see, too, *Horn* v. *Thornborough*, (1849) 3 Ex. 846. In the case of *Lea* v. *Facey*, (1886) 17 Q. B. D. 139; (1887) 19 Q. B. D. 352, it was held that a defendant who had acted as member of a local board without qualification could not be sued for penalties without notice. An older decision to the contrary effect (*Charlesworth* v. *Rudgard*, (1835) 1 C. M. & R. 896) was not quoted.

(*e*) (1839) 9 A. & E. 654.

gamekeeper under 1 & 2 Will. IV. c. 32, but in fact had never been duly authorised. It was held that he was not entitled to notice of action under a section which gave it in case of any action "against any person for anything done in pursuance of this Act." This case therefore must be taken to be overruled, as being inconsistent with the law as laid down in the later authorities. The Metropolitan Building Act (18 & 19 Vict. c. 122, s. 108), gave a right of notice of action to any district surveyor or other person for anything done or intended to be done under the provisions of the Act. It has been held that this provision did not cover every case where a person thought he was carrying out the Act, but that it only included persons *ejusdem generis* as district surveyors, that is to say, the workmen, servants and others who acted under their orders. A defendant to be entitled to notice had to bring himself within this class and prove that he was in fact under the directions of the surveyor, not merely that he thought himself so to be (*a*). It has, however, been held (with a view to saving expense where the contributories were very numerous) that valid notice of a winding up order, in a form prescribed by the Court, might be served either by circular or by advertisement in the public press upon the members of an unregistered friendly society (*b*).

Wrongful act collateral to execution of statutory power.

No notice can be required unless when the act in question either is or is supposed to be one of the things which a statute directly authorises or orders. In *Whatman* v. *Pearson* (*c*), the defendant, a contractor, was constructing a sewer under the provisions of the Metropolitan Management Acts, and in so doing employed a number of carts and horses. One of the workmen injured the plaintiff by his negligent driving. It was held that no notice of action need be given, inasmuch as the driving was not a thing done under the powers of the Act, but merely collateral to the exercise of those powers.

In the case of *Edwards* v. *Vestry of St. Mary, Islington* (*d*), a contractor supplied horses and drivers for the carts employed by the defendants in watering the streets. The plaintiff was one of

(*a*) *Williams* v. *Golding*, (1865) L. R. 1 C. P. 69; *Doust* v. *Slater*, (1869 38 L. J. Q. B. 159; *Chambers* v. *Reid*, (1866) 13 L. T. N. S. 703.

(*b*) *Lead Company's Workmen's Fund Society, In re*, (1904) 2 Ch. 196.

(*c*) (1868) L. R. 3 C. P. 422.

(*d*) (1889) 22 Q. B. D. 338.

the drivers and sustained damage through the breaking down of one of the carts, which was in an unsafe condition by reason of the negligence of the defendants. It was held that the employment of carts was a thing "done or intended to be done under the powers of the vestry," and that they had a right to notice of action, their negligence having been not in a matter collateral but in one of the very things which it was their duty to provide for.

In *Smith* v. *Shaw* (*a*), the defendant was the public officer of a dock company, who under their Act appointed a dock-master with powers to superintend and direct the mooring and unmooring of vessels. By his negligent performance of this duty the plaintiff's vessel was injured. It was held that the dock-master had been acting in pursuance of the statute. But where a railway company were empowered to make a line with liberty to permit the use of it by others or to use it themselves as carriers, it was held that their right to notice for things done or omitted to be done in pursuance of the Act, or in the execution of the powers or authorities given by it, was confined to their acts and omissions as owners of the line and not as carriers (*b*).

Spoken words do not amount to an act or thing done. Notice of action, therefore, is never necessary in an action of slander (*c*).

Wrongful omissions.

Under the expression things done in pursuance of a statute are included wrongs of omission as well as of commission. In *Davis* v. *Curling* (*d*), a surveyor of highways was held entitled to notice of action when sued for negligence in not removing certain heaps of gravel by the roadside for the deposit of which he was not responsible. It was held that he had in effect been guilty of a positive act in continuing an obstruction. So if an act not unlawful in itself has been done, the omission to take

(*a*) (1829) 10 B. & C. 277. In this case the question was as to limitation and not as to notice of action.

(*b*) *Carpue* v. *The London & Brighton R. Co.*, (1844) 5 Q. B. 747. But in an action for extorting unfair rates a railway company are entitled to notice (*Kent* v. *Great Western R. Co.*, (1846) 3 C. B. 714; but see *Garton* v. *Great Western R. Co.*, (1859) 28 L. J. Q. B. 321; commenting on *Kent* v. *Great Western R. Co.*, *supra*.

(*c*) *Royal Aquarium & Summer & Winter Garden Society* v. *Parkinson*, (1892) 1 Q. B. 431.

(*d*) (1845) 8 Q. B. 286.

proper precautions against injurious consequences resulting does not afford a good cause of action without notice (*a*). The case of *Wilson* v. *Mayor of Halifax* (*b*) goes still further. This was clearly a case of non-feasance. The defendants had omitted to erect a fence which by statute they were ordered to do, and it was held that notice must be given.

Form of notice.

The provisions as to the form of the notice vary considerably in different statutes. For example, the Highway Act (*c*) simply directed that notice must be given in writing. The Larceny, Malicious Injury to Property, and Coinage Acts (*d*) required the "cause of action" to be stated. By 11 & 12 Vict. c. 44, s. 9, it had to be "clearly and explicitly" stated, by the Public Health Act "clearly" stated (*e*). In some cases the name and address of the party and his solicitor must be given, in others it is particularly required that such name and address should be indorsed. Sometimes, again, the Court in which the action is to be brought must be mentioned.

Wrongful act should be described with substantial accuracy.

The main requisite is that the party to whom the notice is addressed should be given to understand with reasonable certainty what are the facts relied on against him, in order that he may decide whether he will tender amends or not. It is by no means necessary that the alleged cause of action should be described with technical accuracy, or with great amplitude of detail (*f*). Thus in *Smith* v. *West Derby Local Board* (*g*), the cause of action was for improperly filling up a trench made in the highway. The notice of action was for leaving the highway in an insufficient state of repair. It was objected that the notice of action was for a mere non-feasance, the cause of action for a misfeasance. It was held, however, that the notice was sufficient. In *Jones* v. *Bird* (*h*), the notice alleged that the defendant had altered certain

(*a*) *Poulson* v. *Thirst*, (1867) L. R. 2 C. P. 449; *Jolliffe* v. *Wallasey Local Board*, (1873) L. R. 9 C. P. 62; *Newton* v. *Ellis*, (1855) 5 E. & B. 115.

(*b*) (1868) L. R. 3 Ex. 114. See, too, *Holland* v. *Northwich Highway Board*, (1876) 34 L. T. N. S. 137.

(*c*) 5 & 6 Will. IV. c. 50, s. 109.

(*d*) 24 & 25 Vict. c. 96, s. 113; 24 & 25 Vict. c. 97, s. 71; 24 & 25 Vict. c. 99, s. 33.

(*e*) 38 & 39 Vict. c. 55, s. 264.

(*f*) However, a mere general allegation of a breach of the law will not do. Sufficient facts must be disclosed to constitute a cause of action. See *Towsey* v. *White*, (1826) 5 B. & C. 125; *Freeman* v. *Line*, (1778) 2 Chit. 673.

(*g*) (1878) 3 C. P. D. 423.

(*h*) (1822) 5 B. & Ald. 837.

sewers in so negligent a manner that the plaintiff's house fell down. The defendant in fact while doing the work had neglected to shore up a chimney-stack adjoining the plaintiff's premises, which consequently fell down and caused the damage alleged. It was held that the notice need not specify the immediate cause of the injury.

In *Taylor* v. *Nesfield* (*a*), the defendant was a magistrate and the alleged cause of action against him was a malicious abuse of jurisdiction. The notice, however, was for a trespass and false imprisonment, and it was held that this pointed only to an act done without jurisdiction and that it did not clearly and explicitly state the cause of action, but on the contrary was likely to mislead the defendant as to the real charge which he had to meet. In *Aked* v. *Stocks* (*b*), the defendants were sued for a trespass committed by them in issuing an illegal warrant. The notice mentioned a certain person as having been entrusted with the warrant to whom it was not in fact directed, and was held insufficient on that ground. It may be doubted whether in the present day such an error in mere matter of surplusage and not likely to mislead would be considered fatal.

Time and place.

The time and place of the alleged cause of action should be stated with such accuracy as the circumstances admit of, but the plaintiff is not to be held to an impossibility, and may be relieved from giving particulars which he does not know (*c*), Cases may be conceived in which he could not state the place. An inaccuracy which cannot possibly mislead does not vitiate a notice (*d*).

Formal requirements.

In a like manner the Courts in dealing with the mere technical requirements of notices have avoided a strict interpretation. Where a name and address have to be given, a mistake or imperfection which do not in fact mislead will not be fatal (*e*).

(*a*) (1854) 3 E. & B. 724.

(*b*) (1828) 4 Bing. 509.

(*c*) *Martins* v. *Upcher*, (1842) 3 Q. B. 662; *Breese* v. *Jerdein*, (1843) 4 Q. B. 585; *Jones* v. *Nicholls*, (1844) 13 M. & W. 361; *Jacklin* v. *Fytche*, (1845) 14 M. & W. 381; *Prickett* v. *Gratrex*, (1846) 8 Q. B. 20; *Leary* v. *Patrick*, (1850) 15 Q. B. 266.

(*d*) *Madden* v. *Kensington Vestry*, (1892) 1 Q. B. 614.

(*e*) *James* v. *Swift*, (1825) 4 B. & C. 681; *Osborn* v. *Gough*, (1803) 3 B. & P. 551.

The "abode" of a solicitor may be either his private residence or his place of business (*a*). It has been held, however, that where a notice simply purported to be dated at a certain place, it could not be taken that the date necessarily gave the abode of the person sending the notice (*b*). It has been held in Ireland (*c*) that if the enactment in question requires an indorsement of a name or address, the notice is not sufficient if they appear on the face of it, the Court declining to follow an English *nisi prius* decision to the contrary (*d*).

Claim for compensation.

The notice must be a notice of action. A mere claim for compensation will not suffice (*e*). It must be unconditional. A notice that proceedings will be taken unless certain terms are complied with is bad (*f*).

Notice should be unconditional.

Time of notice how reckoned.

In all cases a month's notice is to be given (*g*) and the period is to be reckoned excluding both the day on which the notice is served and the day on which the writ is sued out. Thus, if notice be given on the first of a month, the action cannot be commenced until the second of the following month, for the party to whom the notice is given ought to have the full space of time allowed for tendering amends (*h*).

Notices under Workmen's Compensation Acts.

Under the Workmen's Compensation Acts, 1897 and 1900, it is provided by section 2 of the Act of 1897, that the notice (which should be in writing) (*i*) "shall give the name and address of the person injured, and shall state in ordinary

(*a*) *Roberts* v. *Williams*, (1835) 2 C. M. & R. 561.

(*b*) *Taylor* v. *Fenwick*, (1782) 3 B. & P. 553, n. See, too, *Williams* v. *Burgess*, (1810) 3 Taunt. 127.

(*c*) *Collins* v. *Hungerford*, (1857) 7 Ir. C. L. R. 581.

(*d*) *Crooke* v. *Curry*, (1789) Tidd's Practice, 9th ed., Vol. 1, p. 30.

(*e*) *Mason* v. *Birkenhead Commissioners*, (1861) 29 L. J. Ex. 407.

(*f*) *Norris* v. *Smith*, (1839) 10 A. & E. 188. For other points as to notice, see *Morgan* v. *Leach*, (1842) 10 M. & W. 558 (notice signed by party and indorsed by attorney); *De Gondouin* v. *Lewis*, (1839) 10 A. & E. 117 (notice given by next friend); *Elstob* v. *Wright*, (1851) 3 C. & K. 31 (notice of action in wrong court); *Bax* v. *Jones*, (1817) 5 Price, 168; *Jones* v. *Simpson*, (1830) 1 C. & J. 174 (several notice against joint wrongdoer); *Hider* v. *Dorell*, (1808) 1 Taunt. 383 (notice to person acting in two capacities); *Pilkington* v. *Riley*, (1849) 3 Ex. 739 (notice in the name of two persons, one of whom deceased); *Lamont* v. *Southall*, (1839) 5 M. & W. 416 (double cause of action, one requiring notice the other not); *Lovelace* v. *Curry*, (1798) 7 T. R. 631 (notice of writ of process).

(*g*) 5 & 6 Vict. c. 97, s. 4.

(*h*) *Young* v. *Higgon*, (1840) 6 M. & W. 49.

(*i*) *Keen* v. *Milwall Dock Co.*, (1882) 8 Q. B. D. 482, C. A.

language the cause of the injury and the date at which it was sustained, and shall be served upon the employers, or if there is more than one employer, upon one of such employers" (*a*).

(*a*) Notice of accident must be given as soon as practicable, and before the injured workman voluntarily leaves the employment in which he sustained the accident.

CHAPTER VI.

DAMAGE.

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In general proof of damage essential to cause of action.

As a general rule an action of tort will not lie unless the plaintiff has suffered some damage sufficiently substantial to be worthy the attention of the Courts, the maxim being "*De minimis non curat lex.*" There are, however, certain exceptional cases in which an action will lie although no damage has been suffered.

Exceptions:— Trespass.

Of such exceptional classes of cases the most important is that of trespass, whether to the person, land, or goods. That an action should be allowed for an invasion of the person, however slight, may well be explained on the ground of the necessity of preventing breaches of the peace; to refuse it might tempt the injured party to take the law into his own hands. And, similarly, in the cases of trespass to lands and goods the rule that the cause of action is independent of damage (*a*) has been said to rest on the doctrine of the inviolability of the person. "These rights of action are given in respect of the immediate and present violation of the possession of the plaintiff independently of his rights of property; they are an extension of that protection which the law throws around the person" (*b*). Consequently a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to substantial damages, although he may have incurred no pecuniary loss thereby (*c*).

Certain classes of nuisance.

Again, in certain cases of nuisance an action lies without the necessity of proving any actual damage to the plaintiff. For instance, a commoner may sue another commoner for surcharging, or a stranger for wrongfully putting beasts on the common,

(*a*) *Bideford Urban Council* v. *Bideford Ry.*, (1904) 68 J. P. 123.

(*b*) *Per* Lord Denman, *Rogers* v. *Spence*, (1844) 13 M. & W. p. 581.

(*c*) *The Mediana*, (1899) P. 127, at p. 136; affirmed, (1900) A. C. 113.

though he have suffered no injury either by reason of his having no beasts of his own to put there (*a*), or by reason of a sufficiency of common being left (*b*). And *à fortiori* a right of action accrues to the commoners when an overt act of the lord of the manor detracts from their enjoyment thus: where the lord of the manor or his assignees so works minerals under the common as to cause a subsidence of the surface (*c*) an injunction will be granted; and where by manorial custom commoners are entitled to draw sand or stone from out the common land, the lord of the manor will be restrained from enclosing the common and thus derogating from the rights of the commoners (*d*). An interference with the water rights of a riparian proprietor is actionable none the less because the plaintiff has never had occasion to use the water (*e*). So where the inhabitants of a district had a right of pot-water, and the owner of the soil from which the water came at various times diminished the supply so that there was not sufficient at such times for the general need of the inhabitants, an inhabitant was held entitled to sue, although there had never been an insufficiency at any time when he had occasion to use the water (*f*). So, in the case of an action for disturbing an easement of light or a right of way, proof of damage to the plaintiff is not necessary. The owner of ancient lights which are obstructed may sue, although the house was unoccupied at the time of the obstruction. If a private right of way be obstructed by the locking of a gate across the way the reversioner of the tenement to which the way is appurtenant may sue, although at such time the obstruction could be no damage to him (*g*). The reason usually assigned for allowing a right of action in all these cases is that the doing of the acts complained of would, if continued, bar the plaintiff's legal right by establishing evidence in future in favour of the wrong-doer (*h*). This reason is open to the objection that it

(*a*) *Wells* v. *Watling*, (1778) 2 W. Bl. 1233.

(*b*) See notes to *Mellor* v. *Spateman*, (1669) 1 Wms. Saund. 346 a.

(*c*) *Bishop Auckland Co-operative Society* v. *Butterknowle Colliery Co.*, (1904) 2 Ch. 419.

(*d*) *Heath* v. *Deane*, (1905) 2 Ch. 86.

(*e*) *Sampson* v. *Hoddinott*, (1857) 1 C. B. N. S. 590.

(*f*) *Harrop* v. *Hirst*, (1868) L. R. 4 Ex. 43.

(*g*) *Kidgill* v. *Moor*, (1850) 9 C. B. 364.

(*h*) *Per* Martin, B., *Harrop* v. *Hirst*, L. R. 4 Ex. p. 45; and (1669) 1 Wms. Saund. 346 a.

theoretically involves a *petitio principii*, for it is only where the party whose right is invaded has the means of resisting the invasion that the continuance of the injurious act affords any evidence against him, on the principle "*Qui non prohibet quod prohibere potest assentire videtur*," and in many cases the only mode of resistance open to him is that of action; but, at the same time, it must be conceded that there would frequently be great difficulty, after the nuisance had continued for a long time, in showing that the plaintiff until recently had suffered no damage, and therefore was not in a position to resist.

But, although in the above-mentioned cases of nuisance there need be no actual present damage to the plaintiff to vest a right of action, still there must be damage in a certain sense,—the injury inflicted must be appreciable, so that the plaintiff's capability of enjoying his rights if he wished to enjoy them would be substantially less. A mere inappreciable diminution in the volume of a stream flowing through the plaintiff's land (*a*), or in the quantity of the light coming to his ancient windows (*b*), or an inappreciable disturbance of his surface by the withdrawal of the support of the adjoining soil (*c*), is not usually a ground of action. Although whenever an injury is done *to a right*, actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of the right, and the law will presume damage (*d*).

In cases of nuisances, however, which are productive of mere personal discomfort, such as noisy or unsavoury trades, in order

(*a*) *Kensit* v. *Great Eastern R. Co.*, (1884) 27 Ch. D. 122.

(*b*) *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. 809. As to the quantum of obstruction, to ancient lights, which will entitle a plaintiff to a mandatory injunction, see *Colls* v. *Home and Colonial Stores, Ltd.*, (1904) 20 T. L. R. 475, H. L. As to when the remedy is in damages, see *Kine* v. *Jolly*, (1905) 1 Ch. 480, C. A.

(*c*) In *Smith* v. *Thackerah*, (1866) L. R. 1 C. P. 564, the Court said that withdrawal of support was not actionable unless followed by appreciable *damage*, but probably all that they meant was that the *subsidence* must be appreciable. See *per* Collins, J., in *Attorney-General* v. *Conduit Colliery Co.*, (1895) 1 Q. B. p. 313. Still in considering whether in a particular case the subsidence is appreciable, some reference must presumably be had to the amount of damage which the plaintiff is likely to suffer from it. And that will to some extend depend upon the locality. A subsidence of a couple of inches in the middle of a valuable cricket ground might be very appreciable, while a subsidence of a foot in the middle of a moor might not.

(*d*) *Embrey* v. *Owen*, (1851) 6 Ex. 353.

to give the plaintiff a cause of action not only must the nuisance have been of such a degree as to afford a capability of substantial annoyance, but the plaintiff must have actually suffered that annoyance. Thus where a confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, but the noise and vibration did not cause any substantial annoyance until shortly before action brought, when the physician erected a consulting-room at the end of his garden, it was held that until such erection of the consulting-room the latter could have brought no action, and therefore until such date the statute did not begin to run against him (*a*). Apparently, in cases of nuisance of this character, the rule of law is, that so long as each of the parties uses his own property for the ordinary purposes for which it was constructed, then so long there is nothing that can be regarded, in law, as an actionable nuisance. But if either party use his property in such an unusual manner as to cause injury to his neighbour, the aggrieved person is entitled to protection (*b*).

Certain classes of breach of duty by public officers.

Again, in certain cases of breaches of duty by public officers, an action has been held to lie for the mere breach without proof of damage. Thus, where under the old law a debtor was taken in execution of a judgment, a mere temporary escape for however short a time was, without more, cause of action against the sheriff (*c*); so, too, in the case of the sheriff delaying to execute a *ca. sa.*, the creditor might sue, though he had suffered no loss by the delay (*d*). So, too, an action lies without damage against a returning officer at a parliamentary election for wrongfully refusing to receive the plaintiff's vote (*e*).

Libel and actionable slander.

The cases of libel, and those kinds of slander which are actionable, *per se*, can hardly be regarded as forming an exception to the general rule that to ground an action the plaintiff must have suffered damage, for it is impossible to exactly estimate the effect of published defamation, and some degree of damage to the

(*a*) *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852.

(*b*) *Sanders-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373; *Knight* v. *Isle of Wight Electric Light and Power Co.*, (1904) 73 L. J. Ch. 299; 90 L. T. 410.

(*c*) *Per* Parke, B., *Williams* v. *Mostyn*, (1838) 4 M. & W. p. 153.

(*d*) *Clifton* v. *Hooper*, (1844) 6 Q. B. 468.

(*e*) *Ashby* v. *White*, (1703) Lord Raym. 938.

plaintiff's character may very reasonably be presumed. And the same observation may be made with reference to the invasion of a trade-mark, which is actionable without proof of any specific injury (*a*), for though the plaintiff may be unable to prove any actual deprivation of custom, yet such deprivation may fairly be presumed. Where, however, substantial damages are claimed the onus of proving loss rests upon the plaintiff (*b*). Infringement of trade-mark.

An action of trover will technically lie notwithstanding that the chattel converted be redelivered before action brought (*c*), unless, indeed, the redelivery be accepted as an accord and satisfaction; but this may, perhaps, be explained on the ground that the cause of action at the date of the conversion was for substantial damage, and a right of action once vested cannot be got rid of by the mere act of the defendant. Trover.

In *Ashby* v. *White* (*d*) Holt, C.J., put forward as an explanation generally applicable to all cases in which an action lies without proof of damage, that "want of right and want of remedy are reciprocal," and that every "injury imports a damage when a man is thereby hindered of his right." This as an explanation, however, seems to be illusory, for it merely transfers the difficulty back one step from the remedy to the right, leaving unsolved the question why in certain classes of rights the right is to have the defendant refrain from doing the act complained of at all, and in others is merely a right not to be damaged. In truth it seems that in many of the cases in which an action is allowed without proof of damage its allowance is dependent not upon any principle, but upon a purely arbitrary rule.

In actions of tort, compensation is the principle of redress, and the measure of damages is, in the absence of matters of aggravation, the exact amount of the injury which the plaintiff has suffered in his person, property, or reputation; including in cases of personal injury the loss of prospective earnings (*e*). Compensation the principle of redress.

And in such cases the assessment of damages is for the jury, consequently, where there is a payment into court, with an

(*a*) *Blofield* v. *Payne*, (1833) 4 B. & Ad. 410.

(*b*) *The Magnolia Metal Co.* v. *The Atlas Metal Co.*, (1897) 14 R. P. C. 389.

(*c*) Bull. N. P. 46; Rolle, Abr. Trespass, P. 6.

(*d*) (1703) Lord Raym. 938.

(*e*) *Johnston* v. *Great Western R. Co.*, (1904) 2 K. B. 250, C. A.

admission of liability, the amount so paid in should not be divulged during the course of the proceedings (*a*).

Damages for matters of aggravation.

But when the tort is accompanied by a malicious intent on the part of the defendant, the jury are allowed to take such malice into consideration in assessing the damages, and to award the plaintiff a sum more than sufficient to compensate him for any injury received by him of the kinds above mentioned. Thus where in an enquiry as to damages, in a case of seduction, the jury awarded the plaintiff 1,000*l.*, the Court refused to set aside the award, although the parties were only in a moderate sphere of life (*b*).

Again, where the defendant insisted on joining the plaintiff's shooting party, and fired at his birds, at the same time using intemperate and insulting language, the jury having awarded 500*l.* damages, the Court refused to disturb the verdict (*c*), Heath, J., giving as a reason for such a refusal that to allow juries to give substantial damages for insult in such cases "goes to prevent the practice of duelling" (*d*). So where the defendant entered the plaintiff's premises and strewed poisoned barley there, whereby some of the plaintiff's fowls died, the jury were directed that they might give substantial damages beyond the loss of the fowls (*e*). And in one case the plaintiff in an action for breaking and entering his house was allowed to give in evidence that his wife was so terrified by the defendant's conduct that she fell ill and died in consequence, for the purpose of showing that the entry was outrageous and violent, a fact which the jury were entitled to consider in assessing the damages (*f*); although in order for illness to enhance damages it must be shown that the malady was the natural or immediate result of the tortious act (*g*). In *Cock* v. *Wortham* (*h*), where the plaintiff in an action for trespass

(*a*) *Jaques* v. *South Essex Water Works Co.*, (1904) 20 T. L. R. 563.

(*b*) *Elliott* v. *Nicklin*, (1818) 5 Price, 641.

(*c*) *Merest* v. *Harvey*, (1814) 5 Taunt. 442.

(*d*) *Ibid.* p. 444.

(*e*) *Sears* v. *Lyons*, (1818) 2 Stark. 317.

(*f*) *Huxley* v. *Berg*, (1815) 1 Stark. 98.

(*g*) *Allsopp* v. *Allsopp*, (1860) 29 L. J. Ex. 315,

(*h*) (1736) 2 Selw. N. P. 10th ed. 1104. Where the act of debauching was committed in the father's house by a person whose presence there was a trespass, the father had his election whether he would sue in trespass *quare clausum fregit* and give the debauching in evidence as matter of aggravation or under the head of *alia enormia*, or on the case *per quod servitium amisit*. See *per* Holt, C.J., *Russell* v. *Corn*, (1703) 6

to a house claimed damages for debauching his daughter and no loss of service was proved, it was said "as to loss of service not having been proved, that was quite immaterial, the rule being that where loss of service is the gist of the action there it must be proved; but where laid only in aggravation of damages, loss of service need not be proved."

Similarly in an American case, where the defendant remained on the portion of the highway opposite the plaintiff's house for the purpose of using slanderous language of the plaintiff, the soil of that portion of the highway being the property of the plaintiff, it was held that the defendant might be sued in trespass, and that in such action the plaintiff might recover damages for the slander as matter of aggravation (*a*). So when the defendant in pulling down his house caused portions of the timber to fall upon the adjoining premises of the plaintiff, where they did damage, it was held that if the jury thought the defendant had maliciously and intentionally caused the timber to fall where it did they might give higher damages than if the injury was the result of mere negligence (*b*). It seems to have been at one time thought that the propriety of giving extra damages for matter of aggravation was confined to cases of trespass, but this has been decided otherwise. In *Bell* v. *Midland R. Co.* (*c*), where the reversioner of a private railway siding sued the defendants for maliciously placing an obstruction between the siding and their railway to which he had a right of access, the jury were held entitled to give damages in excess of the pecuniary injury to the reversion. In one case (*d*), indeed, Lord Esher and Lopes, L.J., said that if

Mod. p. 127, and *per* Buller, J., *Bennett* v. *Allcott*, (1878) 2 T. R. p. 167. And that is presumably still the law. See below, p. 226.

(*a*) *Adams* v. *Rivers*, (1851) 11 Barb. (N.Y.) 290. The plaintiff there sued in trespass to avoid the difficulty of proving special damage, the words used not having been actionable *per se*.

(*b*) *Emblen* v. *Myers*, (1861) 6 H. & N. 54.

(*c*) (1861) 10 C. B. N. S. 287. Where malice is of the gist of the action, the greater the malice the higher are the damages that will be allowed (*Pearson* v. *Lemaitre*, (1843) 5 M. & G. 700).

(*d*) *Dixon* v. *Calcraft*, (1892) 1 Q. B. pp. 464, 466. In the later case of *Smith* v. *Enright*, (1893) 69 L. T. N. S. 724, where an action of replevin was brought for goods distrained for rent which was found not to be due, it was held by a Divisional Court, upon the authority of *Brewer* v. *Dew*, (1843) 11 M. & W. 625, that the plaintiff might recover damages for injury to his reputation in trade caused by the illegal seizure. It is not there stated whether the defendant knew the rent not to be due. If he did, the decision may be

goods be illegally seized under such circumstances as to cast an imputation upon the character of the owner, he cannot in an action for such illegal seizure recover any damages for the injury to his reputation. They, however, seem to have stated the law unnecessarily widely. They were dealing with a seizure which, though illegal, was not malicious. If goods be seized maliciously with an intent thereby to defame, it seems clear on the authority of the above cases that damages for injury to the reputation may be recovered as a matter of aggravation.

Aggravated damages are consolatory, not punitive.

These extra damages are generally spoken of as exemplary, as though the object of allowing them were punitive, and to deter others in like cases offending (*a*). But it is doubtful whether the better view is not that they are consolatory rather than penal, resting upon the principle that where there is malice, the plaintiff suffers from a sense of wrong and is entitled to a *solatium* for that mental pain (*b*). And this latter view seems to be more in accord with the modern practice, according to which in actions of tort evidence of the defendant's means is disallowed, on the ground that it is nothing to the purpose "that damages are taken from a deep pocket" (*c*).

What is legal damage.

It is not every damage that is a damage in the eye of the law. There may be an actionable wrong and damage flowing from that wrong as its natural consequence, and yet no compensation may be recoverable in respect of such damage. Legal damage must be something which is capable of being estimated in terms of money; it must be a temporal and material loss. Thus, expulsion from a religious society is not legal damage (*d*). Loss of the hospitality of friends in the sense of gratuitous

justified, for in *Brewer* v. *Dew* the Court proceeded upon the ground that the seizure was made "under a false and pretended claim of right," and that the act was consequently malicious. If, however, he did not, the case is in direct conflict with the decision of the Court of Appeal in *Dixon* v. *Calcraft*, and consequently cannot be supported.

(*a*) See *per* Wilmot, C.J., *Tullidge* v. *Wade*, (1769) 3 Wils. p. 19; *per* Heath, J., *Merest* v. *Harvey*, (1814) 5 Taunt. p. 444; Mayne on Damages, 5th ed. p. 46.

(*b*) This view has been adopted in America to the extent of allowing aggravated damages against a master for the malice of his servant (*Hawes* v. *Knowles*, (1874) 114 Mass. 518. And see Sedgwick on Damages, 7th ed., Vol. 1, p. 217, n.).

(*c*) *Per* Alderson, B., *Short* v. *Stoy*, (1836) Roscoe, N. P. 17th ed. pp. 64, 87; *James* v. *Biddington*, (1834) 6 C. & P. 589; *Hodsoll* v. *Taylor*, (1873) L. R. 9 Q. B. 79; *Keyse* v. *Keyse and Maxwell*, (1886) 11 P. D. 100.

(*d*) *Roberts* v. *Roberts*, (1864) 5 B. & S. 384,

supply by them of food and drink is sufficiently material for this purpose (*a*), but loss of the mere society of friends as distinguished from their hospitality is not (*b*). It is, however, actionable *per se* without proof of either damage or loss of society to say that the plaintiff is affected by a contagious or infectious disease (*c*).

The extra costs and expenses which are incurred by the successful party in an action in excess of what he recovers on taxation against the other party are not regarded as legal damage, and cannot be recovered in any form of action (*d*). This probably rests upon the ground that the incurring of such extra costs is the voluntary act of the party himself.

In one case (*e*) Lord Esher said that "where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probably a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act" (*f*), even including damage which was not an infringement of any legal right. In that case the owners of a building with ancient windows pulled it down and rebuilt it so that the windows coincided only in part with the old windows. Lord Esher was of opinion that in an action for damages for obstruction of the lights in the new building the owners would be entitled to recover damages for the obstruction of the non-coinciding portion of the windows as well as of the coinciding portion. But that opinion was expressed *obiter*, and seems to be unsupported by other authority.

Remoteness of damage.

Liability in tort is in general confined to the damage which is the proximate result of the tortious act, and does not extend to

(*a*) *Davies* v. *Solomon*, (1871) L. R. 7 Q. B. 112.

(*b*) *Per* Lord Wensleydale, *Lynch* v. *Knight*, (1861) 9 H. L. C. p. 599.

(*c*) *Bloodworth* v. *Gray*, (1844) 7 Man. & Gr. 334.

(*d*) *Sinclair* v. *Eldred*, (1811) 4 Taunt. 7; *Jenkins* v. *Biddulph*, (1827) 4 Bing. 160; *Doe* v. *Davis*, (1795) 1 Esp. 358; *Grace* v. *Morgan*, (1836) 2 Bing. N. C. 534. But see *contra*, *Sandback* v. *Thomas*, (1816) 1 Stark. 306, and *Bradlaugh* v. *Newdegate*, (1883) 11 Q. B. D. 1.

(*e*) *Re London, Tilbury & Southend R. Co. and Trustees of Gower's Walk Schools*, (1889) 24 Q. B. D. 326.

(*f*) *Ibid.* p. 329. For rule of law as to ancient lights, see *Colls* v. *Home & Colonial Stores, Ltd.*, (1904) 20 T. L. R. 475, H. L.

damage which is only remotely connected with it (*a*). "One who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person" (*b*).

In *Smith* v. *London & South Western R. Co.* (*c*) the defendants permitted some trimmings of one of the hedges bordering their railway to remain in heaps between the hedge and the line for a fortnight in very hot weather. Sparks from a passing engine caused the heaps to ignite. The fire caught the hedge and, owing to a high wind which was blowing at the time, spread across a stubble field and over a road, and burnt a cottage of the plaintiff, which was distant two hundred yards from the spot where the fire began. It was held that the damage to the plaintiff was not too remote. In *Powell* v. *Salisbury* (*d*), the defendant, being under an obligation to repair a fence, neglected to do so, whereby the plaintiff's cattle escaped into the defendant's close, and were there killed by the falling of a haystack. The defendant was held liable. In that case, however, although there was no averment or evidence upon the point, it must probably be assumed that the defendant knew, or had the means of knowing, that the haystack was in a condition in which it was likely to fall. In *Sneesby* v. *Lancashire & Yorkshire R. Co.* (*e*), some cattle of the plaintiff were being driven along a road which crossed a siding of the defendants' railway on the level. The defendants negligently caused some trucks to be sent down on to the siding while the cattle were crossing it, and the cattle being frightened rushed away. Some of them were afterwards found

(*a*) As to the application of this rule in the case of undue detention, through the negligence of the carrier's agent, in the course of transit, see *Searle* v. *Lund*, (1904) 90 L. T. 529, C. A.

(*b*) *Per* Bovill, C.J., *Sharp* v. *Powell*, (1872) L. R. 7 C. P. at p. 258.

(*c*) (1870) L. R. 6 C. P. 14,

(*d*) (1828) 2 Y. & J. 391.

(*e*) (1875) 1 Q. B. D. 42. See, too, *Halestrap* v. *Gregory*, (1895) 1 Q. B. 561; but see *Luscombe* v. *G. W. Ry.*, (1899) 2 Q. B. 313, which distinguishes between "passing" and "straying" cattle.

at a distance of a quarter of a mile dead upon the defendants' railway, having escaped, through defects in fences for which the defendants were not responsible, into a garden, and thence on to the line, where they were run over by a passing train. The damage was held to be not too remote. Again, in *Sullivan* v. *Creed* (*a*), the damage was held not too remote, when the defendant left a loaded gun at full cock, beside a gap from which a private path led over defendants' lands from the public road to his house. The defendant's son (aged 15), coming towards his father's house along the path, found the gun, and returning with it to the public road, not knowing it was loaded, pointed it in play at the plaintiff who was injured by the gun going off. But on the other hand, in *Sharp* v. *Powell* (*b*), the defendant's servant, in breach of a Police Act, washed the defendant's van in the public street. The water used in the operation ran down the gutter, and would, under ordinary circumstances, have flowed down a grating into the sewer; but owing to a severe frost the grating had, unknown to the defendant or his servant, become stopped up with ice, whereby the water used in washing the van was unable to get away, and spread over the road and there froze. The plaintiff's horse, while being led past the spot, slipped upon the ice and was damaged. The injury was held to be too remote. In *Hoey* v. *Felton* (*c*), the plaintiff was engaged as a journeyman at a cigar factory, and in the ordinary course of his duties ought to have presented himself at the factory at two o'clock. At half-past one he was wrongfully given into custody by the defendant upon a false charge, and detained for half an hour. By reason of such imprisonment he became so unwell that upon being liberated he was obliged to go home instead of going to his work at the factory; in consequence whereof his employer filled up his place with another workman and he lost his employment. In an action for false imprisonment it was held that the loss of employment was too remote to be the subject of a claim for damages.

(*a*) (1904) 2 Ir. R. 317, C. A.

(*b*) (1872) L. R. 7 C. P. 253. Cp. *Hardacre* v. *Idle District Council*, (1896) 1 Q. B. 335, as to which case see above, p. 109.

(*c*) (1861) 11 C. B. N. S. 142. See also *Hobbs* v. *L. & S. W. Ry.*, (1875) L. R. 10 Q. B., Cockburn, J., pp. 117, 118.

The above decisions show that no general rule can be laid down by reference to which the question, whether in any particular case the damage sought to be recovered is too remote, can be determined. Whether it is or is not too remote is a question of fact depending on all the circumstances of the case, but although a question of fact it is one for the Court to determine.

Nervous shock caused by fright.

Whether injury to health resulting from fear caused by wrongful conduct of the defendant can be the subject of a claim for damages was at one time doubted. It has now, however, been decided that compensation is recoverable for physical injury, although unaccompanied by actual impact (*a*).

A similar decision was arrived at in *Bell* v. *Great Northern R. Co. of Ireland* (*b*), in which it was held that if the defendants' negligence causes, as its natural and reasonable consequence, a great fright which produces nervous shock, and if, as the natural and reasonable consequence of that shock, the plaintiff's health is injured, damages can be recovered for such injury. These decisions, though logically satisfactory, are not in accord with the ruling of the Privy Council in the earlier case of *The Victorian Railway Commissioners* v. *Coultas* (*c*), the material facts in which were as follows: The defendants' servant, in charge of a gate at a place where a road crossed the defendants' line on the level, negligently invited the plaintiff and his wife, who were driving in a vehicle, to cross the line at a time when, owing to the approach of a train, it was dangerous to do so. Just as they had passed over one set of rails the train dashed by. The train did not touch either the plaintiffs or their vehicle, but the fright produced by their dangerous position caused such a severe nervous shock to the female plaintiff that she had a miscarriage (*d*). The Judicial Committee of the Privy Council held that the damage was too remote. This decision, which is not binding in Great Britain, cannot, however, in view of more recent decisions, be regarded as expressing the present state of the law upon the subject.

(*a*) *Dulieu* v. *White*, (1901) 2 K. B. 669. See also *Wilkinson* v. *Downton*, (1897) 2 Q. B. 57.

(*b*) (1890) 26 L. R. Ir. 428.

(*c*) (1887) 13 App. Cas. 222.

(*d*) See 12 Victorian Law. Rep. 895.

Want of proximateness supplied by intention.

But even where the damage is such as a person possessed of all the defendant's knowledge of the surrounding circumstances could not have reasonably anticipated as likely to flow from the wrongful act, the defendant will nevertheless be liable if he intended the result which in fact happened. Intention will supply the necessary link to make that consequence proximate which was *primâ facie* remote. Thus, where the plaintiff was under contract with the owner of land adjoining a high road to execute certain work thereon, and the defendants, a water company, wrongfully permitted their main, which ran along and under the road, to leak, whereby the plaintiff was delayed in the execution of his contract, it was held that the plaintiff had no cause of action, for that the damage was too remote (*a*), but the Court at the same time expressly intimated that if the defendants had intended the result the action would have lain (*b*). Actual intention is not, however, in all cases a necessary concomitant of liability (*c*). And this intention will be presumed when the concurrent circumstances raise a reasonable assumption that the ultimate consequences of the initial negligence were or ought to have been within the contemplation of the tort-feasor (*d*).

Intervening wrongful act of third party.

Where between the act of the defendant and the damage com-

(*a*) *Cattle* v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453.

(*b*) *Ibid.*, p. 458. See, however, *Chamberlain* v. *Boyd*, (1883) 11 Q. B. D. 407. There a statement of claim alleged that, the plaintiff having been blackballed for a club, a proposal was made to alter the rules regulating the election of members to the club, and that the defendant with a view to retain the existing regulations and to secure the exclusion of the plaintiff from membership, published defamatory matter of him, and thereby induced the majority of the members to retain the existing regulations, and so prevented the plaintiff from again seeking to be elected. On demurrer the claim was held bad; one of the grounds of the decision being, that even if the deprivation of an opportunity of candidature was a sufficient legal damage it was too remote, notwithstanding that it was the very result that the defendant intended. But the Court need not be understood to have decided anything which would conflict with the proposition stated in the text; apparently all that they meant was that it was so irrational to suppose that there was any logical connection between the defamation and the retention of the regulations, that the averment of that connection might be disregarded and treated as if it were struck out of the claim; see the judgment of Lord Coleridge at p. 412.

(*c*) *Gibbings* v. *Hungerford*, (1904) 1 Ir. R. 211, C. A.

(*d*) *McDowall* v. *Great Western R. Co.*, (1902) 86 L. T. 558; reversed by C. A. (1903) 2 K. B. 331. It is, however, submitted that the above stated proposition may still be regarded, at least, as arguable.

plained of there intervenes, as one of the links in the chain of causes, the wrongful act or omission of a third party, the question whether the damage is to be regarded as too remotely connected with the defendant's wrong-doing seems to depend upon the following considerations:—

(a) As stated above, intention will supply the want of proximateness; if, therefore, the defendant intends that, as the consequence of the act done by himself, the third party shall do the act which immediately causes the damage, he will be liable. Thus if a printseller exhibit prints or effigies in his window, and thereby attract a crowd to look at them which causes the footway to be obstructed, he will be responsible for the obstruction (*a*), for the very object of putting such things in the windows is that passers-by should stop and look at them. So the erection of a playhouse may be a nuisance by reason of its drawing crowds of people to its doors, and for such nuisance the owners of the house will be responsible (*b*), for they intend the crowds to come there. Again, though it is not the natural consequence of the uttering of a slander that it should be repeated by third persons, yet if the original utterer intended that it should be repeated he will be liable for the consequences of such repetition (*c*).

Where act of third party done negligently.

(b) If the defendant's act is wrongful, and is likely to afford an opportunity to the third party to do the act immediately producing the damage, such third party acting negligently and without intention, the defendant will be liable (*d*). Thus where the defendant wrongfully left a cellar-flap in a street reared against the wall of the house, and a third party negligently caused the flap to fall on the plaintiff, the defendant was held answerable (*e*). So, too, where the defendant unlawfully placed across a roadway a *cheval de frise* to prevent vehicles from using

(*a*) *Rex* v. *Carlile*, (1834) 6 C. P. 636.

(*b*) *Betterton's Case*, (1695) Holt, 538. The case of *Barber* v. *Penley*, (1893) 2 Ch. 447. may be rested on this ground.

(*c*) *Per* Lopes, L.J., *Speight* v. *Gosnay*, (1891) 60 L. J. Q. B. p. 232, and *per* Bowen, L.J., *Ratcliffe* v. *Evans*, (1892) 2 Q. B. p. 530.

(*d*) *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A.

(*e*) *Abbott* v. *Macfie*, (1863) 2 H. & C. 744. For the application of the same principle to a duty arising out of contract, see *Burrows* v. *March Gas & Coke Co.*, (1872) L. R. 7 Ex. 96; *Mowbray* v. *Merryweather*, (1895) 2 Q. B. 640; *Engelhart* v. *Farrant*, (1897) 1 Q. B. 240, C. A.

the road, and some person, without the defendant's authority, subsequently removed it from the roadway on to the footpath adjoining and negligently left it there, and the plaintiff, who was lawfully using the footpath, ran against the spikes of the *cheval de frise* in the dark and was injured, the damage was held not too remote (*a*).

And the same rule applies where the intervening negligence of the third party consists not in a positive act done, but in an omission. Thus where the defendants wrongfully caused water to spout up in a public road, and the plaintiff's horses, which were passing with his carriage along the road, took fright at the water and swerved to the other side of the road, where some third persons who were constructing a sewer had carelessly left a cutting unfenced, and the horses fell into the cutting and were damaged, the plaintiff was held entitled to recover against the defendants, notwithstanding that without the negligence of the third persons the injury would probably not have happened (*b*).

Where, however, a person of mature age with full apprehension of the probable danger chooses, for purposes of recreation, to encounter the risk and is injured, his voluntary and unnecessary exposure of his person to the risk of mischance may avoid his right of action (*c*).

Where act of third party done wilfully.

(c) If the third party, in doing the act which immediately produces the damage, acts not negligently but wilfully, then, even though the defendant's own act was wrongful and the act of the third party was the natural consequence of it, the defendant, if he did not intend that consequence, will not be liable, unless he induced a belief in the third party's mind that he would be justified in doing the injurious act. Thus if the defendant publishes of the plaintiff slanderous matter not actionable *per se*, and the special damage relied on is a wrongful act of a third party done in consequence of such slander, the test of the defendant's liability is whether the third party would, upon the assumption that the slanderous matter was true, be justified in doing the act

(*a*) *Clark* v. *Chambers*, (1878) 3 Q. B. D. 327. See, too, *Collins* v. *Middle Level Commissioners*, (1869) L. R. 4 C. P. 279, and *Scott* v. *Shepherd*, (1772) 2 W. Bl. 892.

(*b*) *Hill* v. *New River Co.*, (1868) 9 B. & S. 303; and see *Sullivan* v. *Creed*, *supra*, p. 144.

(*c*) *Giles* v. *London County Council*, (1904) 68 J. P. 10.

which is laid as special damage (*a*). Therefore, where the defendant said of the plaintiff, a married woman, that she had nearly been seduced before marriage, whereupon her husband in consequence of the slander turned her out of doors, it was held that the expulsion was not sufficient special damage to support an action, for the husband would have had no legal justification in expelling her even if the imputation had been true, though it would have been otherwise if the slander had imputed adultery to the plaintiff (*b*). If, in consequence of a slanderous imputation, third persons afterwards assemble and maltreat the slandered party by way of punishment for his supposed transgression, the slanderer cannot without more be held responsible (*c*); though cases might readily be put in which the circumstances would afford very strong evidence of an intention on the part of the speaker that such a result should follow. But even then it seems that, in order to render the speaker liable in such a case, it is necessary that the jury should find the existence of such intention as a fact (*d*). In the case of *Lynch* v. *Knight* (*e*) Lord Wensleydale inclined to the view that a person guilty of a wrongful act such as slander must be held responsible for all such consequences as, "taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow," but the majority of the law lords, Campbell, Brougham, and Cranworth, seem to have decided that case in direct opposition to such a doctrine (*f*).

In one case, where the defendant having left his horse and cart standing unattended in the street, the horse backed the cart into the plaintiff's window, and it was set up as a defence that the cause of the horse's moving was that a passer-by wantonly whipped

(*a*) *Vicars* v. *Wilcox*, (1806) 8 East, 1, as explained by Lord Campbell in *Lynch* v. *Knight*, (1861) 9 H. L. C. at p. 590.

(*b*) *Lynch* v. *Knight*, (1861) 9 H. L. C. 577.

(*c*) *Per* Lord Ellenborough, *Vicars* v. *Wilcox*, (1806) 8 East, p. 4.

(*d*) *Heapy, T., In re*, (1888) 22 L. R. Ir. 500.

(*e*) (1861) 9 H. L. C. p. 600.

(*f*) It should be observed, however, that the case of *Lynch* v. *Knight* has sometimes been treated as though there were no discrepancy between the opinions of the different law lords. See *per* Brett, L.J., *Chamberlain* v. *Boyd*, (1883) 11 Q. B. D. p. 414, and *per* Huddleston, B., *Whitney* v. *Moignard*, (1890) 24 Q. B. D. p. 631.

the horse, and that consequently the person so whipping the horse and not the defendant was the party liable, Tindal, C.J., at *nisi prius*, said that "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done" (*a*); but this was only an *obiter dictum*, the jury having interposed and stated that they did not believe that the horse had been struck at all.

It has, however, been held in a recent case that where a runaway horse and carriage runs down a person in broad daylight, in a public street, the *primâ facie* presumption is that the owner of the horse and carriage is in fault (*b*).

The mere fact that one person by his wrongful act affords an opportunity to another to commit a wholly independent wrong, cannot render the former liable for the consequences of the latter's wrong-doing. Where, however, the original cause of the ultimate disaster, is the negligent or tortious act of one person, and the "effective" cause of the accident is the negligence of another, between whom and the original wrong-doer there is some relation; or, in other words, where there is the interposition of the negligence of another person, between the primary negligence and the ultimate accident the mediate negligence of the original tort-feasor, which afforded opportunity for the immediate negligence of the second wrong-doer, renders him liable for the injury resulting from such negligence (*c*).

Thus although the immediate vendor of tins of preserved food, or other articles of a similar kind, might not, in all cases, be responsible to his customers for their condition, it appears probable that the wholesale trader, from whom the retail vendor procured them, would be liable to a third party who sustained injury by reason of their unwholesome character, the original vendor, when supplying the goods, being aware that they were purchased from him for human consumption (*d*).

(*a*) *Illidge* v. *Goodwin*, (1831) 5 C. & P. p. 192.

(*b*) *Snee* v. *Durkie*, (1903) 6 F. 42, Ct. of Sess.

(*c*) *Engelhart* v. *Farrant*, (1897) 1 Q. B. 240, C. A. As to the liability of a railway company for neglecting to protect passengers from assaults by their fellow-passengers, see *Pounder* v. *North Eastern R. Co.*, (1892) 1 Q. B. 385, and the observations upon that case in *Cobb* v. *Great Western R. Co.*, (1894) A. C. 419.

(*d*) *Gordon* v. *McHardy*, (1903) 6 F. 210, Ct. of Sess.

(d) It is, however, an obvious proposition that if the defendant's conduct is *per se* lawful, the mere fact that it is likely to induce third parties to commit some independent wrong will not render him liable therefor. Thus where certain members of the Salvation Army assembled together for the lawful purpose of peaceably marching in procession through the streets of a town, but did so with the knowledge that they would probably come into collision with certain other persons antagonistic to themselves, and with good reason to suppose that a breach of the peace would be committed by such latter persons, and in consequence breaches of the peace were in fact committed by such persons, it was nevertheless held that the members of the Salvation Army, having committed no acts of violence themselves, were not responsible for the misconduct of their opponents (*a*).

Doctrine of *Rex* v. *Moore*.

In the case of *Rex* v. *Moore* (*b*), where the defendant used his premises as a pigeon-shooting ground, and in consequence idle persons collected outside the grounds, with the object of shooting the pigeons which escaped, and did damage, it was indeed held that the defendant was liable, notwithstanding that the presence of such third persons was against his wish. But the ground upon which that decision went was that, as the acts of the third persons were the probable consequence of the defendant's act, and such as the experience of mankind must have led any one to expect as the result, the defendant was as answerable as if that result was his real object (*c*), which is the very proposition that was directly repudiated by the majority of the House of Lords in *Lynch* v. *Knight*. *Rex* v. *Moore* has, however, been followed by Page-Wood, V.-C., in *Walker* v. *Brewster* (*d*), by Romer, J., in *Bellamy* v. *Wells* (*e*), and by North, J., in *Barber* v. *Penley* (*f*), though in none of these cases was *Lynch* v. *Knight* referred to. It may be that the doctrine of *Rex* v. *Moore* is too inveterate

(*a*) *Beatty* v. *Gillbanks*, (1882) 9 Q. B. D. 308. See, however, *O'Kelly* v. *Harvey*, (1882) 14 L. R. Ir. 105, where the Court of Appeal in Ireland held that a justice of the peace was justified in dispersing a lawful assembly of persons, if, owing to the probability of such persons being attacked by others who were antagonistic to them, there was no other means of preserving the peace.

(*b*) (1832) 3 B. & Ad. 184.

(*c*) See *per* Littledale, J., S. C. p. 188.

(*d*) (1867) L. R. 5 Eq. 25.

(*e*) (1890) 63 L. T. N. S. 635.

(*f*) (1893) 2 Ch. 447.

to be now overruled, but it is submitted that it is an anomalous departure from principle (*a*).

(*a*) In the case of *Rex* v. *Carlile*, (1834) 6 C. & P. p. 646, reference was made to the case of a Miss Very, the daughter of a confectioner in Regent Street, who attended to her father's shop, and who was considered so beautiful that a crowd of three or four hundred persons used daily to assemble in front of the shop windows for the purpose of looking at her, so that police constables were obliged to be in constant attendance before the house. And similar cases are constantly arising in which persons who happen to be the objects of popular admiration or curiosity involuntarily cause a nuisance to the neighbourhood in which they live. Yet it could never be contended that such persons were liable to an indictment for a nuisance. But the distinction between such cases and that of *R.* v. *Moore* seems to be impalpable.

CHAPTER VII.

SELF-REDRESS AND SELF-PROTECTION.

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THERE are certain classes of injuries in respect of which the party injured is not necessarily bound to resort to the Courts for his remedy, but is entitled to take the law into his own hands and redress the wrong himself. Such is the right in case of trespasses to the person or property.

Defence of the person.

It is lawful for one man to use force towards another in the defence of his own person, but this force must not transgress the reasonable limits of the occasion. Nor does the mere assumption of an attitude of defence, by one party, without actual physical contact with his opponent, necessarily justify the other in making active reprisals (*a*). Where, however, an assault actually takes place the assailed person is not bound to stand on a passive defence, for it is a reasonable means of repelling an attack to attack in return. Nor does the law require that a man when labouring under a natural feeling of resentment consequent on gross provocation should very nicely measure the weight of his blows. A mere assault may justify a battery (*b*), but there must be some proportion between the aggression and the defence. Ordinary violence must be repelled by ordinary means, and a deadly weapon should not be used except against a deadly attack. "A man cannot justify a maim for every assault; as if A. strike B., B. cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby probably his life may be in danger" (*c*).

(*a*) *Moriarty* v. *Brooks*, (1833) 6 Car. & P. 684; *contra* in case of attack, *Stephens* v. *Myers*, (1830) 4 Car. & P. 349.

(*b*) *Dale* v. *Wood*, 7 Moore, 33; *Titley* v. *Foxall*, (1758) 2 Ld. Ken. 308.

(*c*) *Per Cur.*, *Cook* v. *Beal*, (1697)

Defence of wife or husband, parent or child, master or servant.

A husband has the same license in defending his wife as in defending himself, and so a wife in defending her husband. It is said also that a man may justify an assault in defence of his master because protection and allegiance are due to him. So he may justify a defence of his father or mother or children under age (*a*). But it is also said that a master cannot so justify in defence of his servant, because the master might have an action *per quod servitium amisit* (*b*). The distinction and the reason given seem hardly satisfactory.

Defence of property.

Force again may be used in defence of property real or personal, but it can only be so used in resisting something in the nature of a trespass, and in defence of actual possession or the right of possession (*c*). In *Dean* v. *Hogg* (*d*), the defendant had engaged a steam-boat for the conveyance of himself and a party, but the vessel remained under the management and control of the captain. The plaintiff having come on board was ordered to withdraw by the defendant, and on refusal was forcibly expelled. It was held that the defendant had not such possession of the vessel as to justify him upon his own authority in expelling an intruder. In *Holmes* v. *Bagge* (*e*), the plaintiff and defendant were both members of a cricket club; a match was going on and the plaintiff interfered with the game, and persisted in remaining on that part of the ground reserved to the players, of whom the defendant was one. The latter had him removed forcibly, and in an action of assault justified, among other pleas, on the ground that he was defending the possession of the two elevens engaged in the game. It was held, however, that such a plea could not be supported (*f*).

1 Lord Raym. p. 117. See *Cockroft* v. *Smith*, (1705) 11 Mod. 43.

(*a*) 3 Salk. 46. As will be seen (below, p. 200), anyone may use force in order to prevent another being assaulted. But greater latitude is allowed in self-defence and in the defence of a wife or child, than in the defence of a stranger. In the one case the defendant, according to the old form of pleadings, might allege that in resisting the plaintiff, *insultum fecit*. In the other he had to allege that in the first place *molliter manus imposuit*.

(*b*) *Leward* v. *Baseley*, (1695) 1 Lord Raym. 62.

(*c*) *Scott* v. *Brown*, (1885) 51 L. T. 746.

(*d*) (1834) 10 Bing. 345. See, too, *Roberts* v. *Tayler*, (1845) 1 C. B. 117.

(*e*) (1853) 1 E. & B. 782.

(*f*) It is suggested in the judgment (1 E. & B. p. 786) that it would have been a good plea if the defendant had alleged that he caused the plaintiff to be removed on the ground that he was disturbing persons lawfully playing a lawful game.

Actual possession.

Actual possession without, or without proof of, title is sufficient to justify the use of reasonable force in repelling a mere wrong-doer (*a*).

Recaption of chattels.

He who is entitled to the immediate possession of a chattel may commit an assault to recover it from any one who has it in his actual possession and wrongfully detains it, provided that such possession was wrongful in its inception, as, for example, if the party assaulted has taken the chattel by a trespass, or even as an innocent purchaser has acquired it by an act of conversion from some one without title (*b*). But it is apprehended that if a person has a chattel bailed to him, and unlawfully refuses to give it up on the termination of the bailment the owner must bring his action, and cannot use force to recover his property since the original possession was lawful (*c*), and the same rule would apply where the vendor of a chattel wrongfully refuses to make delivery to the purchaser.

Re-entry on land.

He who is entitled to the immediate possession of realty may make an entry, and may, according to the better opinion (*d*), justify in a civil action the use of so much force as is necessary to enable him to effect the entry and to expel the intruder therefrom, provided the degree of violence used does not exceed a common assault; but a forcible entry, though justifiable in an action, renders the party committing it liable to indictment.

It is not lawful as a rule to use force in resisting a trespass to land or goods unless warning be first given. The trespasser should first be requested to desist, and if he refuses so to do, so much force only may be used as is necessary to overcome his resistance. If in resisting he commits an assault, the question

(*a*) *Every* v. *Smith*, (1857) 26 L. J. Ex. 344; *Brett* v. *Mullarkey*, (1873) Ir. Rep. 7 C. L. 120; *Thomas* v. *Marsh*, (1833) 5 C. & P. 596; *Catteris* v. *Cowper*, (1812) 4 Taunt. 547.

(*b*) *Blades* v. *Higgs*, (1861) 10 C. B. N. S. 713; *Rex* v. *Milton*, (1827) 1 M. & M. 107. As to re-vesting of goods in owner upon conviction of thief, see 56 & 57 Vict. c. 71, s. 24.

(*c*) It is on this principle that the cases of entry upon land for the recaption of goods have been decided (see note to *Webb* v. *Beavan* (1844) 6 M. & G. p. 1056, and it is to be presumed that as you may not go upon the land of another to recover your goods, *à fortiori*, you may not commit an assault for such a purpose. As to the circumstances under which an unauthorised entry on land may be justified for the purposes of recaption of chattels, see below, p. 345.

(*d*) See cases collected below, pp. 333–335, where the subject of Forcible Entry is fully dealt with.

then becomes one of defence of person as well as defence of property (*a*).

Violent trespass.

In case, however, of a violent trespass, the trespasser may be resisted at once with the strong hand and without any parley. "It is lawful to oppose force to force, and if one breaks down the gate or comes into my close *vi et armis*, I need not request him to be gone, but may lay my hands upon him immediately, for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request" (*b*).

Attempts to trespass.

It is not necessary in order to justify the use of force that the person against whom it is employed should have actually at the time committed a trespass. It is enough if he is endeavouring to do so, and that force is reasonably necessary to prevent him succeeding in such attempt (*c*).

Limit in use of force in defending property.

Under no circumstances is it lawful merely for the purpose of resisting a trespass to property to use violence likely to imperil life or limb, even though such violence be necessary for the purpose (*d*). Land or goods may be defended by assault and battery, but not by wounding. In *Collins* v. *Renison* (*e*) the plaintiff sued for an assault committed by throwing him off a ladder. It was pleaded that the plaintiff was trespassing, and had persisted in the trespass though requested to desist, and that thereupon the defendant "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff." It was held that this

(*a*) *Polkinhorn* v. *Wright*, (1845) 8 Q. B. 197; *Webster* v. *Watts*, (1847) 11 Q. B. 311. See *Oakes* v. *Wood*, (1837) 2 M. & W. 791.

(*b*) *Per Cur.*, *Green* v. *Goddard*, (1704) 2 Salk. p. 641. See *Weaver* v. *Bush*, (1798) 8 T. R. 78.

(*c*) *Polkinhorn* v. *Wright*, (1845) 8 Q. B. 197. See, however, *Shingleton* v. *Smith*, (1700) 2 Lutw. 1481; as to whether *bonâ fide* belief, by a servant, that the act complained of was necessary for the protection of his master's property will justify the commission of a statutory offence, see *Miles* v. *Hutchings*, (1903) 2 K. B. 714.

(*d*) 2 Inst. 316. And see *Kinsella* v. *Hamilton*, (1890) 26 L. R. Ir. 671. The statement in the Report on the Featherstone Riots (as to which, see below, p. 202), to the effect that "the taking of life can only be justified by the necessity of protecting persons *and property* against various forms of violent crime, &c.," was presumably not intended to negative the proposition above stated, for property can hardly be in peril of seizure or destruction by rioters without life being imperilled at the same time.

(*e*) (1754) Sayer, 138.

plea was bad, since it disclosed a degree of violence which could not be justified for the purpose of preventing the trespass alleged (*a*).

Duress.

Force can only be used in direct assertion of a right of possession. It is not lawful to imprison a man for the purpose of compelling a restitution of property (*b*). And an assault is committed, sounding in damages against the gaoler, when a prisoner is detained by the warders after his acquittal (*c*).

Protection of game.

Whether a landowner can justify shooting a dog which is trespassing upon his land in pursuit of game, depends upon the question whether the game pursued is in actual peril at the time. Where to an action of trespass for shooting the plaintiff's dog, it was pleaded in justification that the dog was chasing hares in the defendant's close, and that the defendant's gamekeeper shot the dog for the preservation of the hares, the Court held the plea bad on demurrer for not alleging that it was necessary to kill the dog to save the hares (*d*). But where it is necessary to kill the dog to save the game it may lawfully be done, and the landowner is not to be deterred from that mode of protection by mere considerations of the relative value of the game protected and of the dog shot. "A man might shoot even a valuable greyhound which was chasing a hare if the hare was in peril" (*e*).

As the only practical mode of protecting crops from the ravages of pigeons is to shoot them, a man may justify shooting his neighbour's tame pigeons if found damaging the crops (*f*).

Distinction according as owner of property invaded is absent or present at time of invasion.

With regard to the nature of the means that may lawfully be employed for the protection of property, a distinction is to be drawn between cases in which the owner of the property is

(*a*) See, too, *Gregory* v. *Hill*, (1799) 8 T. R. 299.

(*b*) *Harrey* v. *Mayne*, (1872) Ir. Rep. 6 C. L. 417.

(*c*) *Mee* v. *Cruickshank*, (1902) 86 L. T. 708.

(*d*) *Vere* v. *Lord Cawdor*, (1809) 11 East, 568. The earlier case of *Wadhurst* v. *Damme*, (1604) Cro. Jac. 45, where a plea that the dog was used to kill conies in the defendant's warren, and was at the time chasing conies there, was upheld, cannot now be regarded as law.

(*e*) *Per* Blackburn, J., *Taylor* v. *Newman*, (1863) 4 B. & S. p. 91; and see *Miles* v. *Hutchings*, (1903) 2 K. B. 714.

(*f*) *Taylor* v. *Newman*, (1863) 4 B. & S. 89; as to when criminal action will lie against a person for shooting pigeons, and as to who may institute proceedings, see *Smith* v. *Dear*, (1903) 88 L. T. 664.

present at the time of the injury being inflicted on the invader, and cases in which the damage is suffered by the invader in his absence. The means which are lawful in the latter class of cases are wider than those which are lawful in the former. "Is it illegal," says Dallas, J., in *Deane* v. *Clayton* (*a*), "to place spikes or glass upon a wall, and if a party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand or cut him with the glass. The doctrine depends on a broad distinction. Presence in its very nature is more or less protection; absence is abandonment and dereliction for the time; presence may supply means and limit what it supplies; but if during absence property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected when absent by such means as he could use if present, is a contradiction in the nature of things." Therefore the owner of a wood may lawfully set dog spears in it for the protection of the game, and if a trespassing dog be killed by running against one of the spears, no action will lie at the suit of the owner of the dog, notwithstanding that no game may have been in peril at the time (*b*).

Setting engines intended to cause serious bodily injury.

But under no circumstances can a person, for the purpose of protecting his property in his absence, justify the setting of a spring-gun or man-trap or other instrument intended to cause serious bodily injury to human beings. Thus in *Bird* v. *Holbrook* (*c*), where the defendant, having had flowers stolen from his garden, set in the garden for its future protection a spring-gun, and the plaintiff, a boy who was in search of a fowl which had strayed into the garden, and who had no knowledge of the existence of the gun, got over the garden wall and, coming into contact with the gun, was damaged, the defendant was held

(*a*) (1817) 7 Taunt. p. 521.

(*b*) *Per* Gibbs, C.J., and Dallas, J., *Deane* v. *Clayton*, (1817) 7 Taunt. 489, and *Jordin* v. *Crump*, (1841) 8 M. & W. 782. Absence of notice to the owner of the dog is immaterial, *ibid.*

(*c*) (1828) 4 Bing. 628. This decision went upon the common law, the cause of action having arisen prior to the passing of the 7 & 8 Geo. IV. c. 18, as to which see below. But the correctness of the decision has been doubted, see *Jordin* v. *Crump*, (1841) 8 M. & W. p. 789.

liable. In the earlier case of *Ilott* v. *Wilkes* (*a*), where the plaintiff was wounded by a spring-gun set for the protection of game in a wood where he was trespassing with knowledge that there were guns set there, the Court held that the action would not lie, but they did so entirely upon the ground that the plaintiff, having had notice of the guns and so having wilfully courted the danger, brought himself within the maxim, *volenti non fit injuria*.

The Act of 7 & 8 Geo. IV. c. 18 (*b*), which prohibited the setting of spring-guns, man-traps, and other engines calculated to destroy human life with intent to inflict grievous bodily harm, was merely declaratory of the common law (*c*), except in so far as it made the mere act of setting such an engine with the above intent a misdemeanour whether without notice or not. Though the statute makes it a criminal offence to set the prohibited engines even with notice, still a trespasser who, having notice, is injured by such an engine, will not be entitled to an action, for the maxim *volenti non fit injuria* will apply notwithstanding the statute (*d*). Whether it is lawful to set a spring-gun or man-trap in a dwelling-house at night to protect it against burglars is doubtful, but perhaps it is so on the principle suggested by Dallas, J. (*e*), that a man may resort to wider means for his protection when he is absent or asleep than when he is awake and on the spot. The above statute contains a proviso that nothing in the Act shall be deemed to make it a misdemeanour to set from sunset to sunrise any spring-gun, man-trap, or other engine which shall be set in a dwelling-house for the protection thereof. Though the proviso does not expressly legalise the setting of such an engine under such circumstances, it suggests that it is lawful.

(*a*) (1820) 3 B. & Ald. 304.

(*b*) Re-enacted by 24 & 25 Vict. c. 100, s. 31.

(*c*) *Per* Best, C.J., (1828) 4 Bing. p. 642.

(*d*) As to a recent application of this maxim, see *Giles* v. *London County Council*, (1904) 68 J. P. 10. It has, indeed, been laid down that where a person, in breach of a *statutory*, as opposed to a common law duty, creates a source of danger, into contact with which another person comes and is damaged, the mere fact that the latter had notice of the danger will not necessarily make his running of the risk voluntary within the meaning of the maxim (see below, Ch. XV.); but it is apprehended that this doctrine does not apply where the party running the risk is a trespasser.

(*e*) See above, p. 155.

Watch-dogs.

But every man has a right to keep even a fierce dog for the protection of his property against trespassers (*a*), for though a dog if savage is likely to injure a trespasser to some extent, it is not likely to do very serious damage.

Protection of property against incursions of the sea, or inland floods.

Analogous to the cases of self-protection above dealt with are those in which an act causing damage to an innocent person is sought to be justified on the ground that it was necessary for the protection of the doer of it, against either the forces of nature or the wrongful act of a third party; but the justification in these latter cases is restricted within much narrower limits.

An owner of land, situate on the sea coast, is entitled to protect his land from the incursions of the sea by building a groin or sea wall, and if the effect of his so doing is to cause the sea to flow with greater violence against the land of the adjoining owners and do damage he will not be responsible (*b*). But the converse of this proposition is not allowable, an owner of foreshore not being entitled to remove a deposit of beach, or other natural safeguard against incursions of the sea, if such removal imperil the adjacent country (*c*). Even in the case of inland water a landowner may, however, lawfully erect a barrier to protect his land from inundation by an extraordinary flood, that is to say, if he anticipates that the flood-water, rising to an unprecedented height, will seek a new course in the direction of his land, over which the ordinary flood-water has not been accustomed to flow (*d*). Nor is a landowner responsible to an adjoining owner for the results of the wrongful act of a third party over whom he has no control, although the mediate, as opposed to the immediate, cause of the damage may arise out of some act of the first landowner (*e*). But he cannot interfere with the course of ordinary flood-water; and, therefore, if a river in times of ordinary flood has been used to overflow its

(*a*) *Per* Tindal, C.J., *Sarch* v. *Blackburn*, (1830) 4 C. & P. p. 300; and *per* Lord Kenyon, *Brock* v. *Copeland*, (1794) 1 Esp. p. 203.

(*b*) *Rex* v. *Commissioners for Pagham*, (1828) 8 B. & C. 355.

(*c*) *Crossman* v. *Bristol & South Wales Union R.*, (1863) 11 W. R. 981.

(*d*) *Neild* v. *London & North Western R. Co.*, (1874) L. R. 10 Ex. 4; and *per* Lord Eldon, *Menzies* v. *Breadalbane*, (1828) 3 Bligh, N. S., p. 418.

(*e*) *Ely Brewery Co.* v. *Pontypridd Urban District Council*, (1904) 68 J. P. 3, C. A.

banks and find an outlet over the lands of the adjoining owner, such owner cannot, for the protection of his lands, lawfully raise the bank of the river if the effect will be to throw the flood-water against the lands of the proprietors on the other side (*a*). And even where the flood is extraordinary, if the water has already invaded the land and collected on it, the owner may not, in order to protect himself against the consequences of the water remaining there, dig a cut for the purpose of getting rid of the water, if by so doing he will cause damage to the parties on whose land he discharges it (*b*), for "there is a difference between protecting yourself from an injury which is not yet suffered by you and getting rid of the consequences of an injury which has occurred to you" (*c*). And this principle probably applies equally to the case of a wrongful deposit upon a man's premises by a third party of something calculated to do damage, in which case it is apprehended that the owner of the premises could not justify removing the noxious thing to the damage of his innocent neighbour, at all events, if the act of removal was deliberate. In *Scott* v. *Shepherd* (*d*), Gould, J., suggested that if a squib was thrown into a coach full of company, the person throwing it out again would not be answerable for the consequences; but probably what he meant was, the suddenness of the thing and the terror inspired by it would leave no time for reflection, and so would deprive the act of ejection of that voluntary character which is essential to liability (*e*). And where the injury to one proprietor, though immediately proceeding from natural causes beyond human control, has been mediately caused by the lawful acts of a neighbouring proprietor, it is very doubtful if the injured party has a remedy (*f*).

Abatement of nuisances.

Another class of injuries in respect of which the party injured is entitled to take the law into his own hands, and provide his own remedy, is that of nuisances.

As a general rule, every one who is damaged by a private

(*a*) *Menzies* v. *Breadalbane*, (1828) 3 Bligh, N. S., 414; *Rex* v. *Trafford*, (1831) 1 B. & Ad. 874; 8 Bing. 204.

(*b*) *Whalley* v. *Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. 131.

(*c*) *Per* Lindley, L.J., *ibid.* p. 140.

(*d*) (1772) 2 W. Bl. 892.

(*e*) See above, p. 8.

(*f*) *Smith* v. *Musgrave*, (1877) 2 App. Cas. 781; *Ely Brewery Co.* v. *Pontypridd Urban District Council*, (1904) 68 J. P. 3, C. A.

nuisance is entitled to abate it. A man may enter upon his neighbour's land, and abate a nuisance of filth which his neighbour has placed there (*a*), provided he suffers special damage thereby, and is not injured merely as a member of the public (*b*). One may justify breaking down a gate which obstructs a private right of way, or cutting off those portions of one's neighbour's trees which project over one's boundary (*c*). And this is apparently the case even when the person damnified has an alternative remedy by injunction (*d*). Indeed, it has been said that "if H. builds a house so near mine that it stops my lights or shoots water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's land and pull it down" (*e*). Whether that proposition can without qualification be regarded as law at the present day may be doubted; an owner of lights which are obstructed it is presumed cannot pull the obstructing house down under circumstances where the Court would refuse a mandatory injunction for its demolition. But in any case the party abating a nuisance must be careful not to interfere with the property of the wrong-doer in excess of what is necessary to abate the nuisance (*f*), and if there are alternative methods of abatement, one of which will be less injurious to the wrong-doer than the other, the least injurious method must be adopted, subject to this, that "where the alternative way involves an interference either with the property of an innocent person or the wrong-doer the interference must be with the property of the wrong-doer" (*g*).

The abator need not wait until actual damage has happened, if in the nature of things it is certain to happen; thus, if his neighbour's eaves improperly project over his land, he may pull them down before any rain has fallen (*h*).

In the case of nuisances to common rights, abatement by a

Nuisances to common rights.

(*a*) *Jones* v. *Williams*, (1843) 11 M. & W. 176; see also *Raikes* v. *Townsend*, (1804) 2 Smith, 9; 7 R. R. 776.

(*b*) *Colchester Corporation* v. *Brooke*, (1845) 7 Q. B. 339; *Dimes* v. *Petley*, (1850) 15 Q. B. 276.

(*c*) *Lemmon* v. *Webb*, (1895) A. C. 1.

(*d*) *Smith* v. *Giddy*, (1904) 2 K. B. 448.

(*e*) *Rex* v. *Rosewell*, (1699) 2 Salk. 459.

(*f*) *Roberts* v. *Rose*, (1865) 4 H. & C. 103.

(*g*) *Per* Blackburn, J., *ibid.* p. 106.

(*h*) *Penruddock's case*, (1597) 5 Rep. p. 101.

commoner is only allowed where the act causing the nuisance is *primâ facie* unlawful. Thus, where the lord of the manor puts rabbits on the common or plants trees there, inasmuch as such acts are *primâ facie* lawful, and only become wrongful if by reason thereof a sufficiency of common is not left, the *onus* of proving which insufficiency lies on the commoner, the latter, however great the nuisance may be, cannot justify digging up the rabbit-burrows (*a*) or cutting down the trees (*b*), but is left to his remedy by action; if the lord has exceeded the bounds of his right it is for the law to determine the *quantum* of the excess.

But where the lord makes an inclosure on the common, inasmuch as an inclosure is *primâ facie* wrongful, the *onus* of proving that a sufficiency of common is left lying in such case upon the lord, the commoner may justify an abatement of the nuisance by pulling down the fence, if the lord is unable to establish that he had left a sufficiency of common (*c*).

The building of a house upon a common, at all events if done by a stranger or another commoner (*d*), is on the face of it an unlawful act, and therefore a commoner may justify pulling down such house, and he may lawfully do so, even if the occupier be living in it at the time, provided he has previously given the occupier reasonable notice to remove it (*e*), but in the absence of such notice he cannot lawfully pull it down while the parties are in it (*f*).

And generally any overt act of the lord which derogates substantially from the rights of the commoners renders him liable to action (*g*).

If the abatement of a nuisance involve an entry upon the offender's land, and such entry be resisted, the abator probably

(*a*) *Cooper* v. *Marshall*, (1757) 1 Burr. 259.

(*b*) *Kirby* v. *Sadgrove*, (1795–7) 1 B. & P. 13.

(*c*) *Arlett* v. *Ellis*, (1827–9) 7 B. & C. 346. As to when a commoner may distrain the cattle of the lord damage feasant on the waste, see *Kenrick* v. *Pargiter*, (1608) Cro. Jac. 208; Yelv. 129.

(*d*) And *semble* also if the house be built by the lord, *Perry* v. *Fitzhowe*, (1846) 8 Q. B. 757.

(*e*) *Davies* v. *Williams*, (1851) 16 Q. B. 546.

(*f*) *Perry* v. *Fitzhowe*, (1846) 8 Q. B. 757; *Jones* v. *Jones*, (1862) 1 H. & C. 1.

(*g*) *Bishop Auckland Co-operative Society* v. *Butterknowle Colliery Co.*, (1904) 2 Ch. 419, C. A.; *Heath* v. *Deane*, (1905) 2 Ch. 86.

cannot justify a resort to force, even though the abatement cannot be effected without it; it has been said that the party aggrieved is only entitled to abate "so as he commits no riot in the doing of it" (*a*). This seems in strict analogy to the rule that goods cannot be distrained while they are in actual use (*b*). In the case of *Davies* v. *Williams*, mentioned above, there was no averment of any assault, and the jury expressly found that the defendants did not actually endanger the lives or limbs of the plaintiff or his family (*c*).

Notice.

Where the abatement of a nuisance involves an entry upon the land on which the nuisance exists, and such land is in the occupation of a person who was not the original creator of the nuisance, the right of abatement cannot be exercised without previous notice to the occupier (*d*), except perhaps where there is such immediate danger to life or health as to render it unsafe to wait (*e*). Probably in no other case is previous notice to the occupier necessary (*f*). Thus, an owner of land overhung by trees growing on his neighbour's land is entitled to cut the overhanging branches without any previous notice if he can do so without going on to his neighbour's land (*g*).

Public nuisances.

In the case of an obstruction to a public way, such as the placing of posts and rails across it, any member of the public may abate the nuisance and pull the obstruction down (*h*), so far as is necessary to the exercise of his right of passage (*i*). But he cannot justify doing more than the necessity of the case requires. Consequently where a public footpath passes through a lane of varying width, also used as an occupation road, there is no

(*a*) 3 Bl. Com., Ch. 1, s. 4.

(*b*) *Field* v. *Adames*, (1840) 12 A. & E. 649.

(*c*) (1851) 16 Q. B. p. 555.

(*d*) *Jones* v. *Williams*, (1843) 11 M. & W. 176.

(*e*) *Per* Lord Abinger, *ibid.* p. 182.

(*f*) There is a *dictum* of Best, J., in *Earl of Lonsdale* v. *Nelson*, (1823) 2 B. & C. 302, to the effect that in case of nuisances of omission notice is necessary except in the case of cutting trees. This point was left open by the House of Lords in *Lemmon* v. *Webb*, (1895) A. C. 1.

(*g*) *Lemmon* v. *Webb*, (1895) A. C. 1.

(*h*) *Webber* v. *Sparkes*, (1842) 10 M. & W. 485.

(*i*) *Dimes* v. *Petley*, (1850) 15 Q. B. p. 283. The proposition in the headnote to this report, to the effect that "a private individual cannot justify damaging the property of another, on the ground that it is a nuisance to a public right, unless it does him a special injury," is somewhat misleading. The right of abatement is not limited to cases in which the party might bring an action, see *Winterbottom* v. *Lord Derby*, (1867) L. R. 2 Ex. 316.

primâ facie presumption that the public right of user extends over the whole surface of the lane at its widest part (*a*). Again, where property is wrongfully placed in the channel of a navigable river so as to cause a nuisance to the public right of passage, a private individual navigating a vessel in the river cannot justify damaging such property by wilfully passing over that portion of the channel where it is placed, if he might with reasonable convenience have exercised his right of passage by going over some other portion of the channel (*b*).

Distress damage feasant.

The subject of distress damage feasant will be found dealt with in the chapter on Distress (*c*).

Railway Fires Act, 1905.

The Railway Fires Act, 1905 (which comes into operation on January 1st, 1908) confers by s. 2 a statutory right upon railway companies not only to enter on any land and do all things reasonably necessary for extinguishing any conflagration that may be caused by sparks emitted from engines, but also (subject to payment of full compensation, including compensation for loss of amenity, and to certain other restrictions) to remove from land adjacent to a railway any wood, undergrowth, or trees likely to catch fire (*d*).

(*a*) *Ford* v. *Harrow Urban Council*, (1903) 88 L. T. 394.
(*b*) *Mayor of Colchester* v. *Brooke*, (1845) 7 Q. B. 339.
(*c*) p. 318.
(*d*) 5 Edw. VII. c. 11.

CHAPTER VIII.

DISCHARGE OF TORTS.

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WHEN there is a vested right of action for a tort it may be discharged by the death of one of the parties, by waiver, by accord and satisfaction, by release, by judgment recovered, and by the Statute of Limitations. Discharge by death has been dealt with in the chapter on Parties; it remains to consider the other methods (*a*).

Waiver by election.

1. If a man has more than one remedy for the same wrong and elects to pursue one of them, giving the go-by to the others, he must stand and fall by his election; the other remedies are waived. "If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury; or waiving the force he may maintain trover for the wrong; or waiving the tort altogether he may sue for money had and received" (*b*).

Trespass waived by suing in trover.

Thus, if a trespass to realty is committed, and portions of it such as minerals, timber, or fixtures, are severed, the injured party, waiving the unlawfulness of the severance, may sue in trover for the value of the severed chattels (*c*). So, if a man is unlawfully deprived of the possession of his property, which is afterwards sold or pledged (*d*), the owner may affirm the transaction, and sue the wrong-doer on a contract implied in law to

Trover waived by suing for money had and received.

(*a*) By 46 & 47 Vict. c. 52, s. 37 (1), damages for a tort are not provable in bankruptcy; bankruptcy, therefore, can never discharge a tort. The decision in *Jack* v. *Kipping*, (1882) 9 Q. B. D. 113, does not, it is apprehended, constitute any exception to this rule.

(*b*) *Per Cur. Rodgers* v. *Maw*, (1846) 15 M. & W. p. 448.

(*c*) *Dalton* v. *Whittem*, (1842) 3 Q. B. 961.

(*d*) *Allanson* v. *Atkinson*, (1813) 1 M. & S. 583.

refund the proceeds (*e*). The commencement of an action or of proceedings in bankruptcy to recover the money is evidence of an election to waive the tort, but not necessarily conclusive evidence.

By agreeing to accept payment.

If, however, a final judgment or order is obtained in the action or proceedings, then the election is final (*a*). A mere demand of the money does not amount to an election (*b*); but in a case where the demand was assented to and a sum paid on account, it was held that the tort was waived (*c*). It would seem that the result would have been the same even though no payment had been made. In *Brewer* v. *Sparrow* (*d*), the defendant had sent to the plaintiff an account of the proceeds of certain goods converted by him, and after deducting expenses had paid over the balance, and it was held that the plaintiffs had waived their right to treat him as a wrong-doer. It is not, however, in every case that the mere receipt of the proceeds of a conversion operates as an election not to sue in tort. Thus, where the finder of a note had cashed it, and he being afterwards arrested on a charge of larceny, some of the money was handed over to the owner, the latter sued successfully in trover for the balance. The plaintiff, by the receipt of money under the circumstances, did not elect to treat the case as one of debt (*e*). Moreover, if a party agree to accept a sum certain in satisfaction of all demands, and a subsequent damage arises from the original tort which was not within the contemplation of either of the parties when such agreement was arrived at, the original accord and satisfaction apparently will not in every case debar the injured party from bringing a further action for damages against the tort-feasor (*f*).

Accord and satisfaction.

2. Any one who has a cause of action may agree with the party against whom the action lies to accept in substitution for the right any good legal consideration, and by such acceptance his cause of action is satisfied, and he can proceed with it no further. This is called an accord and satisfaction.

(*e*) *Smith* v. *Hodson*, (1791) 4 T. R. 211; *Smith* v. *Baker*, (1873) L. R. 8 C. P. 350.

(*a*) *Smith* v. *Baker*, *supra*; *Curtis* v. *Williamson*, (1874) L. R. 10 Q. B. 57; *Scarf* v. *Jardine*, (1882) 7 App. Cas. 345.

(*b*) *Valpey* v. *Sanders*, (1848) 5 C. B. 886.

(*c*) *Lythgoe* v. *Vernon*, (1860) 5 H. & N. 180.

(*d*) (1827) 7 B. & C. 310.

(*e*) *Burn* v. *Morris*, (1836) 4 Tyr. 485. As to the effect of waiver where the cause of action is by or against joint parties, see below, p. 184.

(*f*) *Ellen* v. *Great Northern R. Co.*, (1901) 49 W. R 395.

A criminal offence, although involving a tort, cannot, however, be compounded for by an accord and satisfaction (*a*).

Accord without satisfaction.

A bare accord amounts simply to an understanding between the parties that something shall be done in future which the aggrieved person shall take in satisfaction of his claim, and so long as it remains executory cannot be enforced by either party. The plaintiff cannot sue upon it in substitution for his original cause of action (*b*), nor can the defendant set it up as a defence to that cause of action. "If divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed. . . . Also, if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance" (*c*). If one man agree to take a bill of exchange from another in satisfaction of a claim and receive it by post, he may, nevertheless, at once repudiate the transaction, for the mere receipt is not an acceptance; and unless he assent to the receipt he is not satisfied (*d*).

Mere agreement taken in satisfaction.

The arrangement, however, may be that the cause of action shall be satisfied, not in the future on certain things being done, but forthwith by the mere agreement to do certain things. "There may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement. In the latter case the plea . . . ought to aver that the things have been done, and the agreement without that affords no answer. Where the making of the agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction; that averment in truth carries with it the fact of the performance of all that was to be done in order to settle the action; it leaves nothing *in fieri*, nothing incomplete" (*e*).

Self-executing accord.

Sometimes the accord is self-executing, as, for instance, where parties agree mutually to relinquish claims which they have

(*a*) *Smith* v. *Dean*, (1903) 88 L. T. 664.

(*b*) *Lynn* v. *Bruce*, (1794) 2 H. Bl. 317.

(*c*) *Peytoe's case*, (1611) 9 Rep. p. 79 b; *Wray* v. *Milestone*, (1839) 5 M. & W. 21; *Gabriel* v. *Dresser*, (1855) 15 C. B. 622.

(*d*) *Hardman* v. *Bellhouse*, (1842) 9 M. & W. 596.

(*e*) *Per* Coleridge, J., *Flockton* v. *Hall*, (1850) 14 Q. B. p. 386.

against each other. Such agreement *ipso facto* puts an end to the rights of action on either side (*a*).

Accord without binding contract.

An executory accord need not fulfil all the requirements of a binding contract, since *ex hypothesi* till it is executed it binds neither side, and after execution the question is not whether it could have been enforced, but whether it has in fact been accepted (*b*). But where a party agrees to take in satisfaction of his cause of action not the fulfilment of a promise, but the promise itself, all conditions must be present to make that promise legally binding, since otherwise he will obtain nothing in return for the surrender of his cause of action (*c*). In both cases alike there must be good legal consideration. "In an action upon the statute of Richard II., if the defendant saith that after the entry an accord was made between them that the plaintiff should re-enter the land and the defendant should deliver the evidence of the plaintiff to the plaintiff, this is not any bar of the action, for the delivery of the plaintiff's evidences cannot be any satisfaction of the tortious entry. But, otherwise, it is if he says that the accord was that he should deliver certain evidence concerning the land to the plaintiff and that he delivered them accordingly, this is a good bar if he makes title to the evidences" (*d*).

There must be good consideration.

Accord and satisfaction by arbitration.

If a claim for damages be referred to arbitration and the award be made, it may be pleaded as an accord and satisfaction though not performed; but before award the pendency of an arbitration is no defence to an action, though it may be a ground of stay (*e*).

Conditional accord and satisfaction.

It would appear that it is possible to make an accord and satisfaction conditional. A man may accept a sum as satisfaction of personal injuries on the understanding that if the mischief

(*a*) *Jones* v. *Sawkins*, (1847) 5 C. B. 142; *Crowther* v. *Farrer*, (1850) 15 Q. B. 677; cp. *James* v. *David*, (1793) 5 T. R. 141, where there was an agreement to settle matters in dispute, and to execute bonds not to sue. Here the accord was clearly executory because it was contemplated that further steps should be taken.

(*b*) *Larery* v. *Turley*, (1861) 6 H. & N. 239.

(*c*) *Case* v. *Barber*, (1672) T. Raym. 450.

(*d*) Vin. Ab. Accord. A 4, citing 9 Edw. IV. 19. As to consideration, see *McManus* v. *Bark*, (1870) L. R. 5 Ex. 65; *Boosey* v. *Wood*, (1865) 3 H. & C. 484. The abandonment of claims *bonâ fide* made though in fact unfounded is good consideration (*Callisher* v. *Bischoffsheim*, (1870) L. R. 5 Q. B. 449).

(*e*) *Allan* v. *Milner*, (1831) 2 C. & J. 47; *Harris* v. *Reynolds*, (1845) 7 Q. B. 71.

should turn out worse than it appears to the medical men at the time, he is not precluded from bringing his action (*a*).

And even without a specific understanding, under certain exceptional circumstances, action has been held to be maintainable (*b*).

But accord and satisfaction with one of several enures to all; consequently the acceptance of satisfaction from a joint tort-feasor discharges co-wrong-doers (*c*).

Nor is it necessary in a plea of accord and satisfaction with one of several plaintiffs to aver authority from the others (*d*).

Release.

3. Any surrender of a right of action may be spoken of as a release; but the term is usually applied where the surrender is by deed, and, therefore, requires no consideration (*e*). A release by indenture is only available in favour of those who are expressed as parties thereto (*f*). An absolute covenant not to sue is equivalent to a release, and may be so pleaded (*g*).

Judgment recovered.

4. When an action is brought and proceeds to final judgment, the original right of action is in any case destroyed. If the plaintiff fails, he is estopped from asserting his alleged right in any other form of legal proceedings against the same party (*h*). If he succeeds, the original right in respect of which he sued is merged in the higher and better right which he obtains by his judgment, and he must either bring a fresh action on his judgment or proceed to obtain its fruits by execution.

Again, action by a third party against an agent bars a subsequent action, in respect of the same matter, against his principal (*i*).

Judgment must be of record—foreign judgments.

There is, however, no merger by a judgment which is not of record. The judgment of a foreign court only creates a simple

(*a*) *Lee* v. *Lancashire & Yorkshire* R. Co., (1871) L. R. 6 Ch. 527.

(*b*) *Ellen* v. *Great Northern R. Co.*, (1901) 49 W. R. 395; affirmed, (1901) 17 T. L. R. 453.

(*c*) *Dufresne* v. *Hutchinson*, (1810) 3 Taunt. 117; *Thurman* v. *Wild*, (1840) 11 Ad. & E. 453.

(*d*) *Wallace and Others* v. *Kelsall*, (1840) 7 M. & W. 264.

(*e*) For an example of a release of an action of tort, see *Phillips* v. *Clagget*, (1843) 11 M. & W. 84.

(*f*) *Storer* v. *Gordon*, (1814) 3 M. & S. 308.

(*g*) *Per Cur. Ford* v. *Beech*, (1848) 11 Q. B. p. 871. As to the effect of accord and satisfaction and release to or by joint parties, see below, p. 184.

(*h*) For statutory exception to this see 60 & 61 Vict. c. 37, s. 1, subs. 5.

(*i*) *Cross & Co.* v. *Matthews and Wallace*, (1904) 91 L. T. 500.

contract debt, and, although it may estop the parties from disputing the matters of fact there decided, does not destroy the cause of action (a). It is otherwise, however, if the judgment be satisfied [illegible].

"The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same" [illegible]. Damages resulting from one and the same cause of action must be assessed and recovered once and for all on the principle '*Interest reipublicae ut sit finis litium.*' But in applying this rule it is often a matter of difficulty to determine whether the cause of action in respect of which damages are being sought is the same cause as that for which damages have already been recovered in an earlier action.

A plaintiff is not bound to bring forward in one action all the grievances which he may have against the defendant arising out of the same transaction. Thus if A. wrongfully charges B. with some crime and has him arrested and prosecuted, there is no objection to B. bringing two separate actions, one for the malicious prosecution and one for the false imprisonment (d), and the plea of judgment recovered in one of these actions will not be any bar to the maintenance of the other. Even where there is but one wrongful act, if by means of it two distinct rights are infringed, the infringement of each right will give rise to a distinct cause of action. For this purpose it has been determined that injury to property and injury to the person, although caused by one and the same wrongful act, are infringements of different and independent rights, and therefore a recovery of damages in such case for the injury to the property will not operate as a bar to a subsequent action in respect of the injury to the person (e); and this is so whether the damage was the result of a direct trespass [illegible].

Successive damages.

[illegible] where a man suffers in respect of one and

[illegible] c. 31.
[illegible] v. Cruik-
[illegible] 460.
[illegible] 1854) 9 Ex.
[illegible]
[illegible] v. Humphrey. (1884)
[illegible]
[illegible] L.J. [illegible] p. 149.

the same right, whether of the person, property or reputation as the case may be, successive damages as the result of the same wrongful act, then if the act is not a continuing act, but one over the consequences of which when done the doer has no further control, such as a blow struck or a slander spoken, the causes of action in respect of the several heads of damage are the same, and after recovery in an action for the damage first accruing no fresh action can be brought; and this is so whether the act be actionable *per se* or only derives its actionable quality from the occurrence of some damage (*a*). Thus, it has been held, if after judgment recovered in an action of assault some bodily injury develops itself which was unsuspected at the time of assessing the damages, a second action will not lie (*b*). But this doctrine, at least in civil cases, is not easily reconcileable with the decision of the Court of Appeal in the case of *Ellen* v. *Great Northern Railway Company* (*c*), in which it was held that the following document: "Received of the Great Northern Railway Company the sum of one hundred and ninety pounds in full satisfaction and discharge of all claims, legal and medical charges included, in respect of injuries sustained by Mr. T. E. J. Ellen, near Babworth Crossing, Retford," was no more than a receipt for money, and did not constitute such an agreement as would bar a subsequently accruing ground of action for damage not within the contemplation of the parties when the receipt was given. It has, however, been held in an action by a master for beating his apprentice *per quod servitium amisit* that a fresh action could not be brought from time to time as fresh damage accrued, and that consequently prospective damages might be given (*d*). And the same rule holds with regard to the action for slander, whether the words be actionable in themselves (*e*) or not (*f*). And

Receipt no bar to subsequent action.

When no fresh action for fresh damage is maintainable.

(*a*) In *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas., p. 145, Lord Bramwell suggested that the question whether successive actions would lie depended upon whether the act complained of was actionable without proof of damage or not. But this view will not fit the cases.

(*b*) *Fitter* v. *Veal*, (1701) 12 Mod. 542.

(*c*) (1901) 17 T. L. R. 453, C. A.

(*d*) *Hodsoll* v. *Stallebrass*, (1840) 11 A. & E. 301, and see *Clarke* v. *Yorke*, (1882) 47 L. T. 381.

(*e*) *Per* Lord Holt, *Fittar* v. *Veal*, (1701) 12 Mod. p. 544.

(*f*) *Per* Lord Holt, *ibid.*; *per* Manisty, J., *Lamb* v. *Walker*, (1878) 3 Q. B. D. p. 395; *per* Lord Blackburn, *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. p. 143: though see *contra*, *per* North, C.J., *Townsend* v.

presumably the same rule will apply to the case of fraud notwithstanding that until damage happens there is no cause of action; thus, if in consequence of a fraudulent misrepresentation a person on different occasions buys different parcels of stock, it is apprehended that he cannot have a separate action for each parcel. It has been said that for the purpose of this rule,—that different damages in respect of the same right must, if caused by one and the same act, be recovered in the same action,—injuries to different parts of a man's person caused by different blows struck in the course of the same assault are to be treated as caused by the same wrongful act (*a*). *A fortiori* a publication containing a number of defamatory statements is to be regarded as but one wrongful act; so that it is not open to the aggrieved party to pick out certain sentences and sue upon them, and then after judgment recovered to sue upon other portions of the libel (*b*).

Continuing injury.

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*, and in cases in which damage is of the essence of the action, as in nuisance, a fresh cause of action arises as often as fresh damage accrues. Whenever one person wrongfully puts something upon the land of another, he is not only liable to pay damages for the trespass in placing the thing there, but he is further under an obligation to remove it, and is guilty of a continuing trespass as long as he neglects to do so. Thus, where the trustees of a turnpike road built buttresses to support it on the land of the plaintiff, who sued them in trespass for the erection and accepted money paid into Court in full satisfaction of his claim, it was held that the acceptance of such money was no bar to a subsequent action of trespass for continuing the buttresses there (*c*).

But where a man wrongfully interferes with another's land

Hughes, (1677) 2 Mod. p. 150, and *per* Lord Bramwell, 11 App. Cas. p. 145.

(*a*) *Per* Lord Esher, (1890) 25 Q. B. D. p. 8.

(*b*) *Macdougall* v. *Knight*, (1890) 25 Q. B. D. 1.

(*c*) *Holmes* v. *Wilson*, (1839) 10 A. & E. 503, and see *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. 127.

otherwise than by placing some foreign substance on it, as for instance where he digs a hole in it, although such interference may create a continuing source of injury, he is liable only to pay compensation for the original trespass, and is under no further obligation to prevent the continuance of the state of things which he had created (*a*); consequently in such cases the damages must be recovered once and for all. In the case of continuing nuisances successive actions may from time to time be brought in respect of their continuance (*b*), and therefore in actions for a nuisance prospective damages cannot be given (*c*), except perhaps in the case of obstruction of ancient lights (*d*), though even then the point is a very doubtful one, for either the Court will grant a mandatory injunction which abolishes the nuisance altogether (*e*), or, should the circumstances not warrant the adoption of such a course, will probably grant as damages, once and for all, the difference between the original and the diminished value of the plaintiff's property (*f*). But though it seems probable for the above reasons that there can be no continuing damages in nuisance, there may be two or more actions arising out of the same tort. Thus if a lessee of premises, demised by a life-tenant, with remainder over, sues and recovers damages from a neighbouring householder for having blocked his ancient lights, the damages recovered in such action will not preclude the life tenant from also recovering compensation for the loss he will sustain upon the termination of the lease through the depreciated value of his property, while the reversioner will be entitled to sue for the damage he will ultimately experience from the same cause upon the death of the life tenant. In the case of damage caused by the withdrawal of support to land a fresh action may be brought as each fresh subsidence occurs, although the several subsidences result from the same excavation (*g*), for where an

(*a*) *Clegg* v. *Dearden*, (1848) 12 Q. B. 576.

(*b*) *Whitehouse* v. *Fellowes*, (1861) 10 C. B. N. S. 765; *Shadwell* v. *Hutchinson*, (1831) 2 B. & Ad. 97.

(*c*) *Battishill* v. *Reed*, (1856) 18 C. B. 696.

(*d*) *Jenks* v. *Clifden* (*Viscount*), (1897) 1 Ch. 694.

(*e*) *Cowper* v. *Laidler*, (1903) 2 Ch. 337.

(*f*) *Kine* v. *Jolly*, (1905) 1 Ch. 504, C. A.; *Moore* v. *Hall*, (1878) 3 Q. B. D. 178.

(*g*) *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. 127; *Crumbie* v. *Wallsend Local Board*, (1891) 1 Q. B. 503; and see *Barr* v.

excavation is made, and the adjoining land is left unsupported, there is "not merely an original act the results of which remain, but a state of things continued" (*a*).

Matter of aggravation.

Although it is generally true that where an action has been brought and judgment recovered damages which might have been obtained in that action cannot be subsequently sued for, it must be remembered that in many cases a plaintiff may allege what is in itself a distinct and separate cause of action as mere matter of aggravation of some other cause of action. Thus, if A. breaks and enters the close of B. and cuts down a tree and carries it away, he is guilty of two torts, one the trespass to the land, and the other the conversion of the chattel. B. may, in an action of trespass *quare clausum fregit*, recover the whole damage which he has sustained including the loss of the tree, but it is apprehended that he is not bound to do so, and that if he brings his action for trespass without alleging or recovering the damage by the loss of the tree, he may afterwards recover such damage in a separate action. So, where a libel is published in a newspaper, it is customary to aggravate the damage by proving the circulation of the paper (*b*). But the sale of every separate copy of a newspaper is a separate wrong, and it is apprehended that, theoretically speaking, there is nothing to prevent an action on the sale of each copy with separately assessed damages (*c*). In *Lacon* v. *Barnard* (*d*) the defendant seized and subsequently sold certain sheep of the plaintiff. Some time afterwards the plaintiff brought an action of trespass in respect of the taking of the sheep, and recovered only nominal damage. He then sued in trover for the value of the same sheep, and the defendant pleaded the recovery in the first action. But it was held that the plaintiff might well recover in respect of the cause of action which he had in respect of the sale of the sheep.

Baird & Co., (1904) 6 F. 524, Ct. of Sess.

(*a*) *Per* Bowen, L.J., *Darley Main Colliery Co.* v. *Mitchell*, (1884) 14 Q. B. D. p. 138.

(*b*) *Per* Pollock, C.B., *Gathercole* v. *Miall*, (1846) 15 M. & W. p. 331. For other matters of aggravation, see *Risk Allah Bey* v. *Whitehurst*, (1868) 18 L. T. N. S. 615. As to limitations of legitimate comment in public press, see *McQuire* v. *Western Morning News*, (1903) 2 K. B. 100 (subsequently reversed on appeal).

(*c*) Where actions are unduly multiplied, a defendant's remedy is to have them stayed as an abuse of the process of the Court.

(*d*) (1622) Cro. Car. 35,

Where the matter of complaint in fact gives rise to but one cause of action, the rule that more than one action cannot be brought cannot be evaded by an alteration in the form of pleading. If a man recover damage for the taking of his goods as a wrongful distress, he cannot afterwards sue in respect of the same taking as an irregular distress (*a*).

Satisfied judgments.

There are cases in which a plaintiff is debarred from bringing an action by reason of his success in a previous proceeding for a different cause; but in such cases he must not only have obtained a judgment, but under that judgment must have obtained full satisfaction for his wrong, and the defence, therefore, rests on a ground altogether different from "*exceptio rei judicatæ*," in which it is immaterial whether the judgment is satisfied or not. If the damages in an action of trover are assessed on the basis of the full value of the chattel converted and are paid, the owner being fully satisfied, is devested of his property and cannot afterwards maintain an action for a different conversion of the same chattel (*b*). So if A. breaks his contract with B. at the inducement of C., and B. recovers and is paid damages by A. for the breach of contract, he will not, under ordinary circumstances, be entitled to sue C. for procuring the breach of contract (*c*).

Bribing agent.

But if a principal is defrauded through the means of a bribe given to his agent he has cumulative remedies. He may recover the amount of bribe from the agent or sub-agent (*d*), and none the less recover from the agent and the briber full damages for the fraud (*e*). And even where the advice given by an agent to his principal is *bonâ fide*, the receipt of a secret commission by such

(*a*) *Phillips* v. *Berryman*, (1783) 3 Douglas, 286. See *Gibbs* v. *Cruikshank*, (1873) L. R. 8 C. P. 454. In this case the right of action may be said to be destroyed rather by election and waiver than by judgment recovered. In the old case of *Field* v. *Jellicus*, (1683) 3 Lev. 124, it was held that a plaintiff who had sued in trespass for the taking of two horses, but had not recovered damages representing their value, might sue again in trover for their value in respect of the same taking. But this case, it is apprehended, is bad law. For typical case of "irregular" distress, see *Poynter* v. *Buckley*, (1833) 5 C. & P. 512.

(*b*) *Brinsmead* v. *Harrison*, (1871) L. R. 6 C. P. 584.

(*c*) *Bird* v. *Randall*, (1762) 3 Burr. 1345.

(*d*) *Powell and Thomas* v. *Evan Jones & Co.*, (1905) 1 K. B. 11, C. A.

(*e*) *Salford, Mayor &c., of* v. *Lever*, (1891) 1 Q. B. 168; *Hovenden* v. *Millhoff*, (1900) 83 L. T. 102. See *Bagnall* v. *Carlton*, (1877) 6 Ch. D. 371. As to judgment without satisfaction on a collateral remedy, see *Drake* v. *Mitchell*, (1803) 3 East, 251.

agent avoids any contract which the principal may have made by reason of such tainted advice (*a*).

The judgment of a foreign court, or of an inferior court not of record, as is pointed out above, is in itself no bar to an action, but appears to be something in the nature of an accord (*b*). If, therefore, it is carried into effect, it amounts in general to a complete satisfaction. But it is otherwise when the carrying into effect of the award of a court of special and limited jurisdiction will not necessarily satisfy a whole cause of action. In *Midland R. Co.* v. *Martin & Co.* (*c*), the defendants had obtained from a magistrate an order for the delivering up of certain goods detained by the plaintiffs. They counterclaimed for the special damage caused by the detention, and it was held that they might well do so, since the magistrate had no jurisdiction to deal with the special damage. So in *Nelson* v. *Couch* (*d*) it was held that the enforcing of a maritime lien against a vessel for damage caused by the negligence of those in charge of her was no answer to an action for the same negligence, unless it appeared that full satisfaction had been obtained.

Effect of proceedings before a magistrate.

In certain cases previous proceedings before a magistrate founded on the same subject-matter form a statutory defence to an action of assault. By 24 & 25 Vict. c. 100, ss. 42, 43, magistrates have power to convict summarily persons charged with common assaults and certain assaults on women and children under fourteen, and either to imprison or to impose a fine and costs. By s. 44, if the justices upon hearing such charges "upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of *such* dismissal, and shall

(*a*) *Shipway* v. *Broadwood*, (1899) 1 Q. B. 369. As to when secret commission received, without fraud, by an agent does not avoid his right to payment of an agreed commission by his principal, see *Hippisley* v. *Knee Bros.*, (1905) 1 K. B. 1.

(*b*) See *Smith* v. *Nicolls*, (1839) 5 Bing. N. C. 208; *Barber* v. *Lamb*, (1860) 8 C. B. N. S. 95; *Wright* v. *London Omnibus Co.*, (1877) 2 Q. B. D. 271. As to the plea of judgment recovered by or against joint parties, see below, p. 184.

(*c*) (1893) 2 Q. B. 172.

(*d*) (1863) 15 C. B. N. S. 99.

deliver such certificate to the party against whom the complaint was preferred." The hearing, it is to be observed, must be upon the merits. In *Reed* v. *Nutt* (*a*) the plaintiff had taken out a summons for assault against the defendant. He subsequently gave him notice that he should not further prosecute the summons. The defendant nevertheless attended before the magistrate and obtained a certificate of dismissal. The plaintiff subsequently brought an action for the assault, and it was held that the certificate was invalid, not having been given after a hearing on the merits, and was consequently no bar to the action (*b*). By s. 45 the party obtaining such a certificate shall be released from all further proceedings, civil or criminal, for the same cause, whether immediate or consequential (*c*), and the same effect follows if he is convicted and has served his imprisonment or paid the whole amount adjudged against him.

Dismissal of charge.

In the case of a dismissal of the charge, it is the granting of the certificate and not the dismissal itself which operates as a release; the certificate can only be proved by itself, and therefore it must show upon the face of it that there was *such* dismissal as is contemplated by the Act, namely, after a hearing "on the merits," and upon one of the grounds mentioned in the Act (*d*). The magistrates are bound to grant the certificate upon application, and may be compelled to do so by *mandamus* (*e*). No time is limited within which the application must be made. The word "'forthwith' in the section does not make the immediate grant of the certificate a condition of its validity, but means forthwith if demanded" (*f*).

Conviction.

If the defence relied on is a conviction this must be proved by the production of the original record, or an examined copy (*g*).

(*a*) (1890) 24 Q. B. D. 669.

(*b*) Whether the proper course would not be first to quash the certificate on *certiorari*, *quære*; see *per* Lord Coleridge, *ibid.* p. 674.

(*c*) *Masper* v. *Brown*, (1876) 34 L. T. N. S. 254; 1 C. P. D. 97.

(*d*) *Skuse* v. *Davis*, (1839) 10 A. & E. 635.

(*e*) *Hancock* v. *Somes*, (1859) 1 E. & E. 795.

(*f*) *Costar* v. *Hetherington*, (1859) 1 E. & E. 802; overruling *Reg.* v. *Robinson*, (1840) 12 A. & E. 672.

(*g*) Strictly speaking, of course there is no *record*, but the magistrates are bound if required to certify their judgment in writing, *per* Byles, J., *Hartley* v. *Hindmarsh*, (1866) L. R. 1 C. P. p. 556.

If the justices simply bind over the party summoned there is no conviction within the meaning of the Act (*a*).

Proceedings by other parties.

Sect. 45 relieves the party from all further proceedings, whether at the suit of the party assaulted or of any one else. A master cannot recover for loss of service occasioned by an assault on his servant, or a husband for his injury consequential on an assault upon his wife (*b*).

Statutes of Limitation.

5. By 21 Jac. I. c. 16, s. 3, it is provided "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover and replevin for taking away of goods and cattle, all actions . . . upon the case . . . and all actions of assault, menace, battery, wounding and imprisonment . . . shall be commenced and sued within the time and limitation hereafter expressed and not after, that is to say, the said actions upon the case (other than for slander) . . . and the said actions for trespass, . . . detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* . . . within six years next after the cause of such actions or suit and not after, and the said actions of trespass, of assault, battery, wounding and imprisonment, or any of them, . . . within four years next after the cause of such actions or suit and not after, and the said action upon the case for words . . . within two years next after the words spoken and not after" (*c*).

By the term "action upon the case for words" is intended only slander actionable in itself. Slander actionable by reason of special damage, slander of title, and libel are not included, but come under the general class of actions on the case (*d*). The result is that for slander actionable in itself the period of limitation is two years, for trespass to the person four years, for other torts six years. And for the purpose of computing the time the statute runs from the date of the actual damage (*e*).

(*a*) *Hartley* v. *Hindmarsh*, (1866) L. R. 1 C. P. 553.

(*b*) *Masper* v. *Brown*, (1876) 1 C. P. D. 97.

(*c*) As to ejectment, see Ch. XIII. As to the special periods of limitation by and against executors and administrators, see above, pp. 52–56.

(*d*) *Law* v. *Harwood*, (1627) Cro. Car. 140; *Saunders* v. *Edwards*, (1662) 1 Sid. 95. See, however, *per* Lord Cranworth, *Backhouse* v. *Bonomi*, (1858–61) 9 H. L. C. p. 513.

(*e*) *Backhouse* v. *Bonomi*, (1861) 9 H. L. C. 503.

By s. 7 of the same Act, if any person at the time when his cause of action accrues is "within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned or beyond the seas," the period of limitation is not to begin to run until the disability ceases. However, the second of these disabilities is now removed by 45 & 46 Vict. c. 75, s. 1, and the fourth and fifth by 19 & 20 Vict. c. 97, s. 10.

By 4 & 5 Anne, c. 16, s. 19, if any person against whom exists any one of the causes of action mentioned in the statute of James is at the time of the accrual of the cause of action beyond the seas, the period of limitation does not begin to run until his return. By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom nor the Islands of Man, Guernsey, Jersey, Alderney, Sark, nor any Islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond the seas within the meaning of the above-cited statute of Anne. If a defendant come within the seas for however short a time, the statute begins to run even though his presence be unknown (*a*). Where there is a conflict of time between the British Statutes of Limitation and a foreign or colonial statute in an action commenced in this country, the former prevail, provided the effect of the foreign or colonial statute is not to extinguish the liability but merely to bar the remedy (*b*).

The ambassador of a foreign Government in this country, in virtue of his privilege of exterritoriality, cannot be sued (*c*), and the statute does not begin to run in his favour any more than if he were actually beyond the seas (*d*).

The effect of these various exceptions is that the party suing has the whole excepted time *plus* the ordinary period of limitation in which to bring his action. Consequently, a defendant against whom a cause of action accrues while beyond the seas may be sued at any time before his return, and also within the limited

(*a*) *Gregory* v. *Hurrill*, 5 B. & C. 341. As to the effect of foreign statutes of limitation where the tort is committed abroad, see above, p. 118.

(*b*) *Alliance Bank of Simla* v. *Carey* (1880) 5 C. P. D. 429; *Finch* v. *Finch*, (1876) 45 L. J. Ch. 816; *Harris* v. *Quine*, (1869) L. R. 4 Q. B. 653.

(*c*) See above, p. 42.

(*d*) *Musurus Bey* v. *Gadban*, (1894) 1 Q. B. 533; (1894) 2 Q. B. 352. In this case it was also held that Ord. XI. of the rules of 1883, providing for service of writs abroad, does not in any way affect the provisions of 4 & 5 Anne, c. 3, s. 19.

time after it. His return does not create a fresh cause of action from which the statute begins to run (*a*).

By the Public Authorities Protection Act (*b*), which applies only to acts done and to neglects and defaults in the execution or intended execution of an Act of Parliament or of a public duty or authority (*c*), (and does not include a private duty, arising out of a contract entered into by a public authority (*d*)), it is provided that where "any action . . . is commenced . . . against any person for any act done in pursuance or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, . . . the action shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of (*e*), or in the case of a continuance of injury or damage (*f*) within six months next after the ceasing thereof" (*g*). The Act sweeps away a great number of special limitation sections under different Acts of Parliament, and substitutes for them a general enactment covering all cases of the attempted execution of a statutory duty. It also greatly alters the law by giving for the first time a protection to those executing a public duty or authority which exists not by virtue of any statute, but at common law. The precise effect of the words "public duty or authority" has yet to receive judicial interpretation in many cases, though it has been held that they apply to officials, acting in their official capacity, under the direction of a county council (*h*), and to a medical practitioner, in private practice, who gives the notification required by statute in a case of illness, wrongly diagnosed by him (*i*). It is also clear that a sheriff who wrongfully seizes under a writ of *fi. fa.* is within the protection of the Act. But, on the other hand, it has been held *not* to apply to an independent contractor, doing under contract and for his own profit, work which a public

(*a*) *Forbes* v. *Smith*, (1855) 11 Ex. 161.

(*b*) 56 & 57 Vict. c. 61, s. 1.

(*c*) *O'Brien* v. *Mitchelstown Loan Fund*, (1903) 1 Ir. R. 282, C. A.

(*d*) *Sharpington* v. *Fulham Guardians*, (1904) 2 Ch. 449.

(*e*) *Cree* v. *Vestry of St. Pancras*, (1899) 1 Q. B. 693.

(*f*) See next page.

(*g*) As to the kind of cases that come within the scope of this enactment, see above, pp. 121, *sqq.*

(*h*) *Greenwell* v. *Howell*, (1900) 1 Q. B. 535, C. A.

(*i*) *Salisbury* v. *Gould*, (1904) 68 J. P. 158.

authority has been authorised to do (*a*); or to proceedings for a rule *nisi* for a *quo warranto* for the purposes of costs (*b*). It may be doubted whether a private individual, who gave a man in charge under the mistaken belief that a felony had been committed, would be within such protection, although in a sense he would be intending to act in the execution of a public duty. The statute seems to be designed for the protection of public functionaries (*c*).

When statute begins to run.

The period of limitation begins at the time when the cause of action is first complete (*d*). When, therefore, there is a trespass or other act which of itself constitutes a wrong, the action must be brought within the appointed time from the act itself. And this rule applies where it is sought to charge a public authority with the expenses of extraordinary traffic. Even when the act complained of comes within the mischief contemplated by the Locomotives Act 1898, which provides (s. 12 (1) (*b*)), that proceedings "shall be commenced within twelve months of the time at which the damage has been done" (*e*). But in actions of which the gist is some consequential damage, then, inasmuch as without damage there is no action, the statute does not begin to run until the damage accrues (*f*).

Continuing wrongs.

Where there is a continuing nuisance or a continuing trespass, every fresh continuance is a fresh cause of action, apparently relating back to the original wrong, and therefore an injured party who sues after the cessation of the wrong may recover not only for such portions of it as lie within the period limited; but also for earlier infringements committed within the period of six years limited by the Statute of Limitations (*g*). And this rule

(*a*) *T. Tilling, Ltd.*, v. *Dick, Kerr & Co., Ltd.*, (1905) 1 K. B. 562.

(*b*) *Rex* v. *Carter*, (1904) 68 J. P. 466.

(*c*) As for the period of limitation where it is necessary to prove title to land, see Ch. XIII.

(*d*) *Lyles* v. *Southend Corporation* (1905) 2 K. B. 1, C. A.

(*e*) *Parker* v. *London County Council*, (1904) 2 K. B. 501.

(*f*) *Roberts* v. *Read*, (1812) 16 East, 215. In this case the decision was on a statute which limited the time from the "fact committed." Nevertheless it was held that the time began to run, not from the doing of the wrongful act, but from the suffering of the damage. Where negligence is a breach of contract as well as a tort, the time begins to run from the negligent act; see *Howell* v. *Young*, (1826) 5 B. & C. 259. As to fraud, see *per* Field, J., *Gibbs* v. *Guild*, (1881) 8 Q. B. D. p. 301.

(*g*) *Harrington, Earl of* v. *Derby Corporation*, (1905) 1 Ch. 206.

that the continuance of a trepass gives rise, at any period during such continuance, to a fresh cause of action has been held to apply in cases of trespass to the person. Thus, where the plaintiff was discharged from a wrongful imprisonment of a month's duration on the fourteenth of December and issued his writ on the fourteenth of June (the period of limitation being six months), it was held that he was entitled to sue in respect of the trespass to his person committed on the fourteenth of December (*a*). But where a defendant maliciously opposed the discharge from custody of the plaintiff insolvent, and thereby caused a prolongation of his imprisonment under the Judge's order, the time was held to run from the malicious act, and not from the termination of the imprisonment, which although a damage, was not a continuing wrong, the detention of the plaintiff being the act of the Court (*b*). In cases of withdrawal of support, each subsidence is an independant cause of action, and may be sued for within the period limited (*c*); and when the subsidence is a continuing process, each fresh damage caused by its continuance is a fresh wrong (*d*).

The liability of a husband under 45 & 46 Vict. 75, s. 14, for a prematrimonial tort of the wife does not constitute a fresh cause of action. When the action is statute-barred as against the wife it is statute-barred also against the husband (*e*).

Where no person capable of suing.

It sometimes happens that there is no person in existence capable of availing himself of a cause of action otherwise complete. In such cases it appears that the statute begins to run not from the time when the wrongful act is done or the damage occurs, but from the time when the plaintiff first acquires title. "It cannot be said that a cause of action exists unless there is also a person in existence capable of suing" (*f*). Thus, if between the death of an intestate and the taking out letters of administration any act of trespass or trover is done to his chattels,

(*a*) *Hardy* v. *Ryle*, (1829) 9 B. & C. 603.

(*b*) *Violett* v. *Sympson*, (1857) 8 E. & B. 344.

(*c*) *Backhouse* v. *Bonomi*, (1858-61) E. B. & E. 622; 9 H. L. C. 503; *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. 127.

(*d*) *Crumbie* v. *Wallsend Local Board*, (1891) 1 Q. B. 503.

(*e*) *Beck* v. *Pierce*, (1889) 23 Q. B. D. 316.

(*f*) *Per Cur. Murray* v. *East India Co.*, (1821) 5 B. & Ald. p. 214.

the administrator can sue within six years of grant of administration (*a*). But the same rule does not apply in the case of an executor, who may commence an action on his title before taking out probate, though he cannot succeed at the trial unless he has proved the will in the interval (*b*).

No suspension after time has once begun to run.

When the period of limitation once commences it is not broken by any subsequently accruing disability, nor by the fact that for the time being there was nobody in existence who could sue. If a person having a vested cause of action dies before he can commence proceedings, and no personal representative is appointed until the time has expired, the action is barred (*c*).

How time computed.

In computing the time of limitation the day on which the cause of action arose is, as a rule, to be excluded, and the day on which the action is commenced is to be included. The principle is that "where the act done from which the computation is made is one to which the party against whom it runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger it ought to be excluded" (*d*).

Limitation of actions of trover.

Subject to the exception pointed out hereafter, the right to recover possession of a chattel is not affected by lapse of time. With regard to realty the law is clear that possession for a sufficient lapse of time confers an indefeasible title. The effect of 3 & 4 Will. IV. c. 27, is to "make a parliamentary conveyance of the land" (*e*). The effect of the statute of James, however, is different. It does not bar the right, but the remedy. Thus, in the case of a debt more than six years old, if the defendant does not plead the statute the law will "treat the debt as an existing obligation, and lend the process of the Court to enforce its discharge" (*f*), and on the same principle a statute-barred debt may without further consideration be renewed by acknowledgment.

(*a*) *Pratt* v. *Swaine*, (1828) 8 B. & C. 285.

(*b*) See Williams on Executors, Pt. i. Bk. iv. Ch i. § ii. See, too, *Plant* v. *Cotterill*, (1860) 5 H. & N. 430, a case of the assignees of a bankrupt suing for a tort committed between the bankruptcy and their appointment.

(*c*) *Rhodes* v. *Smethurst*, (1838–40) 4 M. & W. 42; 6 M. & W. 351; *Boatwright* v. *Boatwright*, (1873) L. R. 17 Eq. 71.

(*d*) *Per Cur. Hardy* v. *Ryle*, (1829) 9 B. & C. p. 608.

(*e*) *Per* Parke, B., *Doe* v. *Sumner*, (1845) 14 M. & W. p. 42; *Trustees of Dundee Harbour*, v. *Dougall*, (1852) 1 Macq. H. L. 317.

(*f*) *Per* Lord Penzance, *Coombs* v. *Coombs*, (1866) L. R. 1 P. & D. p. 289.

It follows, therefore, that when the owner of a chattel has been wrongfully deprived of it, although by lapse of time he may be prevented from suing the wrongdoer, yet that he does not lose his property by mere continuance of dispossession, and consequently that he may sue for every fresh wrongful act. Thus, in *Miller* v. *Dell* (*a*), A. was possessed of a lease which more than six years before the action had been fraudulently deposited by B. with C. as security for a loan. C. became bankrupt, and his trustee made over the lease to D. A. thereupon demanded the lease from D., and upon his refusal sued him for a conversion, and recovered. It was held that the statute only barred the remedy against B. and C., and that though D. claimed under them, time only began to run in his favour from the date of the wrong which he himself had committed.

If, however, one and the same person, being a stranger to the party entitled, is guilty of successive acts of conversion with respect to the same chattel, the period of limitation begins to run from the date of the first act, and is not extended by any subsequent act (*b*). It is, however, otherwise as between bailor and bailee. If a bailee is sued for refusing to deliver up to his bailor the chattel entrusted to him he cannot be heard to say that more than six years before he had converted it to his own use (*c*).

And where a transaction between two parties is tainted by an original misrepresentation by one of them, neither *laches* nor condonation will be imputed to a plaintiff who has continued to make payments (under protest) after finding out the misrepresentation. Such payments being held not to amount to an affirmation of the contract by him (*d*).

Concealed fraud.

The mere fact that a person possessing a right of action was

(*a*) (1891) 1 Q. B. 468. The reasoning of the case is perfectly general. However, Lord Esher (pp. 471–2) adverts to the fact that the subject-matter of the action was a title deed, and therefore probably stood on a special footing. It has been said that, the possession of title deeds being simply ancillary to the possession of land, the right to recover the deeds is not lost so long as the right to recover the land remains. See *per* Pollock, C.B., *Plant* v. *Cotterill*, (1860) 5 H. & N. p. 440.

(*b*) *Philpot* v. *Kelly*, (1835) 3 A. & E. 106; *Wilkinson* v. *Verity*, (1871) L. R. 6 C. P. 206.

(*c*) *Wilkinson* v. *Verity*, *supra*. Even if the bailee no longer has the goods in his possession, he may be sued in detinue, though the action of trover may be barred (*Granger* v. *George*, (1826) 5 B. & C. 149). See below, p. 255.

(*d*) *Molloy* v. *Mutual Reserve Life Assurance Co.*, (1905) 22 T. L. R. 59.

unable to sue by reason of his ignorance of his right was not in the Courts of Common Law an answer to a plea of the Statutes of Limitation (*a*). The Courts of Equity, however, which did not consider themselves strictly bound by these statutes, introduced an exception in cases of "concealed fraud" (*b*), which by 3 & 4 Will. IV. c. 27, s. 26, received a statutory recognition with respect to actions relating to real property.

The doctrine of "concealed fraud," or, as it perhaps might be more conveniently termed, fraudulent concealment, is that so long as a party is ignorant that he possesses any right at all, or knowing of his right is ignorant that it has been infringed, the statute does not run against him, provided that in the first place his ignorance is not due to his own negligence, and secondly is due to the misconduct of the person relying on the statute or of some one privy with him (*c*). Thus it was held that the statute did not run in a case in which an agent, who was an express trustee, after receiving moneys on account of his principal wilfully omitted to account for them (*d*). Where, however, the "fraud" is neither that of the person setting up the statute nor of his predecessors in title, s. 26 of the Real Property Limitation Act, 1833, does not apply (*e*). In one case, indeed, it was said (*f*) that a mining trespass innocently committed was concealed fraud, but this seems altogether opposed to the other authorities (*g*), and has since been disapproved by the Privy Council (*h*).

The application of the doctrine in common law actions has been discussed in two cases since the Judicature Act (*i*). It is clear that where the action is brought for relief which was within the original equitable jurisdiction of the Court of Chancery, as

(*a*) *Imperial Gas Light & Coke Co.* v. *London Gas Light Co.*, (1854) 10 Ex. 39.

(*b*) This subject is considered more fully below, pp. 374–375.

(*c*) *Thorne* v. *Heard*, (1895) A. C. 495. See below, p. 374.

(*d*) *North American Land & Timber Co.* v. *Watkins*, (1904) 2 Ch. 233, C. A.

(*e*) *McCallum, In re, McCallum* v. *McCallum*, (1900) 49 W. R. 129.

(*f*) *Per* Malins, V.-C., *Ecclesiastical Commissioners* v. *North Eastern R. Co.*, (1877) 4 Ch. D. p. 860.

(*g*) *Per* Kindersley, V.-C., *Petre* v. *Petre*, (1852) 1 Drew. p. 397; *Dean* v. *Thwaite*, (1855) 21 Beav. 621.

(*h*) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. 351.

(*i*) *Gibbs* v. *Guild*, (1882) 8 Q. B. D. 296; 9 Q. B. D. 59; *Armstrong* v. *Milburn*, (1886) 54 L. T. N. S. 247, 723.

for example, an action of fraud, the chancery decisions apply (*a*). But it has been denied that their authority extends to actions which could formerly have been brought nowhere but in a Court of Common Law (*b*).

Joint wrong-doers.

The general rule is, that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all. Thus, if one of two joint tort-feasors (*c*) be sued, and judgment be recovered against him, although not satisfied, yet the whole of the original cause of action is gone, and the other tort-feasor is free (*d*). The same rule applies if accord be made with one joint tort-feasor and satisfaction accepted (*e*), or if he be released under seal (*f*). But a covenant not to sue does not get rid of the cause of action, and therefore only operates in favour of the person to whom it is given (*g*). Where a party purports to release one wrong-doer with a reservation of his right of action against another, this is to be taken as an agreement not to sue rather than as a release (*h*). It is apprehended that if a tort be waived by electing a different remedy against one of the tort-feasors, the election is binding as against the other (*i*).

Covenant not to sue.

Different measure of damages.

Hardship may sometimes arise from this rule of law. The measure of damages against joint tort-feasors is by no means always the same. One may have acted maliciously, and the

(*a*) *North American Land & Timber Co.* v. *Watkins*, *supra*, p. 183.

(*b*) *Per* Mathew, J., (1886) 54 L. T. N. S. p. 248.

(*c*) As to what constitutes a joint tort, see above, pp. 63–66.

(*d*) *Brown* v. *Wootton*, (1604) Cro. Jac. 73 ; *Brinsmead* v. *Harrison*, (1871–2) L. R. 6 C. P. 584 : 7 C. P. 547. But the obtaining of compensation for an assault against one tort-feasor in a proceeding before a magistrate under 24 & 25 Vict. c. 100, s. 45, does not discharge the cause of action against another joint tort-feasor. See *Dyer* v. *Munday*, (1895) 1 Q. B. 742.

(*e*) *Thurman* v. *Wild*, (1840) 11 A. & E. 453. See *Mayor of Salford* v. *Lever*, (1890) 25 Q. B. D. 363 ; (1891) 1 Q. B. 168.

(*f*) Co. Litt. 232.

(*g*) *Hutton* v. *Eyre*, (1815) 6 Taunt. 289.

(*h*) *Duck* v. *Mayeu*, (1892) 2 Q. B. 511.

(*i*) *Buckland* v. *Johnson*, (1854) 15 C. B. 145. This was a converse case, where the plaintiff having sued one tort-feasor in trover was not allowed to sue the other for the money had and received. The reason given by Jervis, C.J., that the judgment in trover changed the property, is wrong. See *Brinsmead* v. *Harrison*, (1871) L. R. 6 C. P. p. 589. Maule, J., puts the decision on the ground of the election. In *Mayor of Salford* v. *Lever*, (1890) 25 Q. B. D. 363 ; (1891) 1 Q. B. 168, the remedies of the plaintiff were cumulative and not alternative.

other mistakenly (*a*). An injured party may sue and recover moderate damages against a defendant whom he afterwards discovers to have been the mere agent of some person in the background against whom he might have obtained aggravated damages, but he must be content with his first judgment.

Where one of joint wrong-doers is beyond the seas.

It does not appear to have been decided how the absence of one joint tort-feaser beyond the seas affects the limitation of the right of action against the other. Before 19 & 20 Vict. c. 97, s. 11, it was held that the statute did not run in favour of joint debtors if one of them was beyond the seas, insomuch as both were necessary parties, and moreover it was not just that the creditor should be compelled to sue the one within the seas, and thereby lose his remedy altogether against the other (*b*). The latter of these reasons would apply to actions against joint tort-feasors.

Joint plaintiffs.

Where two or more persons have a joint action of tort in respect of a joint interest, any one of them may release it, make accord and accept satisfaction, or it is presumed waive it (*c*). If, however, he does so in fraud of his co-plaintiffs, and in collusion with the wrong-doer, the fraud is a good equitable reason to prevent the transaction being set up in answer to the action (*d*).

May recover separately to the extent of interest.

If one of such persons brings an action, although the other parties jointly interested ought to be joined with him, yet if no objection is taken in the proper way, he can proceed and recover to the extent of his interest, and the other parties can maintain an action subsequently in respect of their interest. Thus, one of several part owners of a chattel suing by himself in trover is entitled to damages to the value of his share (*e*).

(*a*) See *Clark* v. *Newsam*, (1847) 1 Ex. 131.

(*b*) *Fannin* v. *Anderson*, (1845) 7 Q. B. 811; *Towns* v. *Mead*, (1855) 16 C. B. 123.

(*c*) *Phillips* v. *Claggett*, (1843) 11 M. & W. 84; *Wallace* v. *Kelsall*, (1840) 7 M. & W. 264. *Steeds* v. *Steeds*, (1889) 22 Q. B. D. 537, is not an authority to the contrary.

(*d*) *De Pothonier*, v. *De Mattos*, (1858) E. B. & E. 461.

(*e*) *Addison* v. *Overend*, (1796) 6 T. R. 766; *Sedgworth* v. *Overend*, (1797) 7 T. R. 279; *Bloxam* v. *Hubbard*, (1804) 5 East, 407. See above, p. 67. See, however, *Broadbent* v. *Ledward*, (1839) 11 A. & E. 209. This limitation of

Disability of joint plaintiff.

The disability of one of the parties in whom a joint right of action vests does not prevent the statute running, for the party not under disability may use the name of the other to sue, just as he may release or accept satisfaction on his behalf (*a*)

damage applies where the part owner seeks to recover on the strength of his title. If he is in actual possession the rule is probably the same. See this subject discussed below, pp. 277, *sqq*.

(*a*) *Perry* v. *Jackson*, (1792) 4 T. R. 516.

CHAPTER IX.

TRESPASS TO THE PERSON.

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THE security of a man's person, which is the most elementary of civil rights, may be directly attacked by actual violence inflicted or menaced, or by a deprivation of liberty. There are accordingly three kinds of trespass to the person—battery, assault, and false imprisonment.

Battery.

1. Any physical damage to the person immediately caused by the act of a wrong-doer may amount to a battery. Thus, of course, anything can be called a blow, whether inflicted with hand, weapon, or missile, is a battery. It is a battery to throw water over a man or to spit in his face (*a*). It is a battery to overturn the chair in which a man is sitting (*b*). In *Dodwell* v. *Burford* (*c*), the defendant struck the horse which the plaintiff was riding. The latter having been thrown and injured, recovered in this form of action (*d*),

Hostile intent.

It has been already pointed out that a trespass is a direct exercise of force to the person or property of another, either negligently or wilfully. If one man fires a gun carelessly and hits another, it is a battery, though he never designed the shot to

(*a*) *Pursell* v. *Horn*, (1832) 8 A. & E. 602; *Reg.* v. *Cotesworth*, (1704) 6 Mod. 172.

(*b*) *Hopper* v. *Reeve*. (1817) 7 Taunt. 698.

(*c*) (1670) 1 Mod. 24.

(*d*) It is said that to forcibly take a chattel from the possession of a man is in itself an assault, *per* Powell, J., *Green* v. *Goddard*, (1704) 2 Salk. 640.

touch him (*a*). With regard to those cases where the act is done on purpose, it is frequently said that in order to constitute a battery there must be a hostile intent. "The least touching of another in anger is a battery" (*b*). If a tap be given on the shoulder for the purpose of effecting an arrest, and the arrest be unlawful, the mere tap constitutes a battery (*c*). "If two or more meet in a narrow passage, and without any violence or design of harm, one touches the other gently, it will be no battery." But "if any of them use violence against the other to force his way in a rude and inordinate manner it will be a battery, or any struggle about the passage to that degree as may do hurt will be a battery" (*d*). "If one strike another upon the hand or arm, or breast in discourse, it is no assault, there being no intention to assault" (*e*). On principle, however, it would seem that the true test is not whether a hostile intent on the part of the defendant, but whether an absence of consent on the part of the plaintiff, can be inferred (*f*). Thus it is a battery for a medical practitioner to vaccinate a person against his will. If one man goes on to the land of his neighbour in a reasonable and peaceable manner for the purpose of speaking to him, it is no trespass, because, although there is no express permission,

Implied consent.

(*a*) *Weaver* v. *Ward*, (1616) Hob. 134; see *Leame* v. *Bray*, (1803) 3 East, 593. See above, pp. 8–9.

(*b*) *Per* Holt. C.J., *Cole* v. *Turner*, (1704) 6 Mod. p. 149.

(*c*) *Rawling* v. *Till*, (1837) 3 M. & W. 28.

(*d*) *Per* Holt, C.J., *Cole* v. *Turner*, (1704) 6 Mod. p. 149.

(*e*) *Per Cur. Tuberville* v. *Savage*, (1669) 1 Mod. p. 3.

(*f*) There is perhaps no great practical difference between the two ways of stating the law, but the distinction may be material. In *Coward* v. *Baddeley*, (1859) 4 H. & N. 478, the plaintiff sued for an assault and false imprisonment. The defendant justified on the ground that he had been assaulted by the plaintiff. The facts were that the defendant had been engaged in extinguishing a fire, and the plaintiff came up and told him he was managing the hose improperly. The defendant told the plaintiff to mind his own business. The plaintiff then put his hands on the defendant's shoulder and turned him round, pointing out all the while how the hose ought to be managed. The defendant thereupon gave the plaintiff into custody for an assault. The jury were directed that the defendant was not justified unless the plaintiff had acted with hostile intent, and this direction was held correct. But the Court, though holding that in the absence of intent there could be no *criminal* assault such as to justify an arrest, seem to have doubted whether under the circumstances the plaintiff might not have been liable to an action of battery; obviously because the defendant could not have been said under the circumstances to have impliedly assented to the manner in which the plaintiff laid hands on him.

yet leave and licence may be inferred. In the same way, it may be said, that if one man touches another for the purpose of calling his attention, there is an implied assent to the act which makes it no battery.

It is to be observed, however, that under the old forms of pleading a distinction with regard to the defence of consent was made between a trespass to the person and other kinds of trespass. A defendant in trespass to land or goods who relied upon this defence had to confess and avoid by a plea of leave and licence; but in trespass to the person he might prove his case under the plea of not guilty, inasmuch as it was considered a contradiction in terms to speak of an assault by consent (*a*).

How far consent a defence.

It has been doubted whether the maxim of *volenti non fit injuria* applies to all cases of trespass to the person. If two men fight together by agreement for a prize or otherwise and without any animosity against each other, simply for the purpose of testing which is the better boxer, they are clearly both consenting parties to the injuries which they mutually inflict on each other. Nevertheless, their conduct may amount to a breach of the peace, and if so, they may be convicted of an assault (*b*). This is quite in accordance with the general principles of the criminal law, for the gist of the matter being the injury to the public peace, the consent of the parties is immaterial. It has further been ruled at *nisi prius* that for an action founded on a battery criminal in its nature, the defence of consent is not available (*c*). And the same opinion is expressed in *Reg* v. *Coney*. "The true view is, I think, that a blow struck in anger or which is likely or intended to do corporal hurt is an assault, but that a blow struck in sport and not likely nor intended to cause bodily harm is not an assault, and that an assault being a breach of the peace and unlawful the consent of the person struck is immaterial" (*d*). It is not, however, in every case that a criminal offence causing damage to another is a ground of action. Thus, a forcible entry is an indictable offence, but if the party so entering has the right

(*a*) *Christopherson* v. *Bare*, (1848) 11 Q. B. 473.

(*b*) *Reg.* v. *Coney*, (1882) 8 Q. B. D. 3.

(*c*) *Boulter* v. *Clerk*, (1747) Buller, N. P. p. 16. See, too, *Matthew* v. *Ollerton*, (1693) Comb. 218.

(*d*) *Per* Cave, J., (1882) 8 Q. B. D. p. 539. See, however, *per* Hawkins, J., *ibid.* p. 553.

of possession he is not, it would seem, civilly responsible (*a*). Nor in the case under consideration does there seem any reason why the plaintiff should be in a better position because he was a party to the crime. If two men are guilty of indecent conduct towards each other they commit a misdemeanor, but it would seem strange to allow them for such conduct reciprocally to bring actions.

A summary conviction for assault is, however, no bar to the person convicted subsequently instituting a civil action for damages against the prosecutor for an alleged antecedent assault by him (*b*).

Consent induced by fraud.

A consent induced by the fraud of the person doing the act is a mere nullity, where the misapprehension of the consenting party goes to the root of the whole transaction, and alters the whole nature and quality of the act done. Thus, where a girl allowed a man to have carnal knowledge of her under the belief that she was submitting to a surgical operation, it was held that he was guilty of a rape (*c*). It has, however, been held by Ridley, J., in the more recent case of *Reg.* v. *O'Shay* (*d*), that if a woman, even though induced by fraudulent misrepresentation, gives conscious permission to the act of connection, the offence does not amount to rape. And a mere mistake as to the effect and consequences of the act done does not annul the assent so as to make the act an assault. If one man administers a poison to another who takes it in ignorance of its noxious character, this is no trespass at common law, although he may be found guilty of a graver charge. The same rule applies where contagion is conveyed by physical contact. If there is consent to the contact the remedy for the wrong, however great, cannot be obtained in this form of action (*e*).

Assault.

2. An assault may be defined as an attempted battery. That is to say, there must be an overt act indicating an intention to commit a battery, coupled with the capacity of carrying that

(*a*) See *per* Parke, B., *Harvey* v. *Brydges*, (1845) 14 M. & W. p. 442 See below, pp. 333–335.

(*b*) *Wilson* v. *Bennett*, (1904) 6 F. 269, Ct. of Sess.

(*c*) *R.* v. *Flattery*, (1877) 2 Q. B. D. 410.

(*d*) (1898) 19 Cox, C. C. 76.

(*e*) *R.* v. *Clarence*, (1888) 22 Q. B. D. 23, at p. 42. See *Hegarty* v. *Shine*, (1878) 14 Cox, C. C. 124, 145.

intention into effect (*a*). There are obvious reasons why in dealing with security of the person the law should treat the mere attempt as a substantive wrong. "If you direct a weapon, or if you raise your fist, within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault" (*b*). It is an assault to present a gun in a hostile manner within shooting distance, although it may be at half-cock, because the cocking is a momentary operation (*c*). There may be an assault although the defendant is not within striking distance, as, for instance, if he makes a rush at the plaintiff but is stopped before he is near enough to deal a blow (*d*). In *Mortin* v. *Shoppee* (*e*), the defendant pursued the plaintiff with an uplifted whip intending to strike him, but the latter made his escape, and it was held an assault. A mere gesture, however menacing, is not actionable if it appear at the time that there is no intention to put the menace into immediate effect. In *Tuberville* v. *Savage* (*f*), the defendant put his hand to his sword and said, "If it were not assize time I would not take such language from you." It was held to be no assault.

False imprisonment.

3. A false imprisonment is complete deprivation of liberty for the time being without lawful cause. The prisoner may be confined within a definite space by being put under lock and key, or his movements may simply be constrained by the will of another. The constraint may be actual physical force, or merely the apprehension of such force, or it may be submission to a legal process (*g*). But merely giving a person in charge, without actual arrest, is not an imprisonment which will support an action (*h*). If a writ or warrant for a man's apprehension is exhibited to him, and he thereupon for the time submits himself to the orders of the officer executing it, he becomes a prisoner though

(*a*) *Read* v. *Coker*, (1853) 13 C. B. 850.

(*b*) *Per* Pollock, C. B., *Cobbett* v. *Grey* (1849-50) 4 Ex. p. 744.

(*c*) *Per* Willes, J., *Osborn* v. *Veitch*, (1858) 1 F. & F. p. 318.

(*d*) *Stephens* v. *Myers*, (1830) 4 C. & P. 349.

(*e*) (1828) 3 C. & P. 373.

(*f*) (1669) 1 Mod. 3.

(*g*) *Warner* v. *Riddiford*, (1858) 4 C. B. N. S. 180.

(*h*) *Simpson* v. *Hill*, (1795) 1 Esp. 431.

his person be never touched (*a*). In *Arrowsmith* v. *Le Mesurier* (*b*), a constable was entrusted with a warrant for the apprehension of the plaintiff. He showed the warrant, and the plaintiff afterwards accompanied him before a magistrate. It was held that there had been no intention to apprehend on the one hand or submission to arrest on the other, that the warrant had been simply used as a summons to indicate to the plaintiff that he was required to appear to the charge, and that consequently there had been no arrest. In *Berry* v. *Adamson* (*c*), the plaintiff sued for a malicious arrest. A writ had been placed in the hands of a sheriff's officer, who gave him notice of it and asked him to attend and give a bail bond, which the plaintiff did. He was non-suited on the ground that this did not amount to an arrest. A mere partial interference with freedom of locomotion does not amount to an imprisonment. If a road is blocked so that a man is thereby prevented from exercising a right of way and he is compelled to return on his steps, it cannot be said that he has thereby been made a prisoner (*d*).

Continuance of imprisonment.

Any one, including a corporation (*e*), who either initiates or helps to continue a wrongful detention, is guilty of false imprisonment, though he be not responsible for the original wrong (*f*). If a prisoner in lawful custody acquires a right to his discharge, the failure of the person who has him in charge to let him go constitutes a false imprisonment (*g*).

Imprisonment in unauthorised place.

If there is authority to confine a prisoner in one place and he be confined in another, this is a wrongful confinement. In *Cobbett* v. *Grey* (*h*), the plaintiff being in custody as an insolvent, had been improperly removed to a wrong part of the prison and confined among a wrong class of prisoners. The majority of the Court held that this was a trespass. Pollock, C.B., however, dissented on the ground that the governor of the jail had general

(*a*) *Grainger* v. *Hill*, (1838) 4 Bing. N. C. 212.

(*b*) (1806) 2 B. & P. N. R. 211.

(*c*) (1827) 6 B. & C. 528.

(*d*) *Bird* v. *Jones*, (1845) 7 Q. B. 742.

(*e*) *Cornford* v. *Carlton Bank, Ltd.*, (1900) 1 Q. B. 22.

(*f*) *Griffin* v. *Coleman*, (1859) 4 H. & N. 265. Except where in the course of duty he acts under a warrant good on the face of it. See Ch. XXII.

(*g*) *Wythers* v. *Henley*, (1614) Cro. Jac. 379. See *Migotti* v. *Colvill*, (1879) 4 C. P. D. 233; *Mee* v. *Cruikshank*, (1902) 86 L. T. 708.

(*h*) (1849-50) 4 Ex. 729; see Bac. Ab. Trespass, D. 3.

authority to confine him within the walls of the prison, and that if he had neglected the rules with regard to the classification of prisoners, this was a breach of his official duty for which he might be responsible to his superiors, but not in an action of trespass at the suit of each prisoner aggrieved.

Agency of an officer of the law.

The question of responsibility of a defendant for a trespass in which he has not personally participated, but which is alleged to have been committed by his authority, is dealt with elsewhere in the chapter on Parties. There is, however, a special kind of agency which it is convenient here to consider. An act amounting to a trespass may have been committed through the instrumentality of some officer or minister of the law, and it may be sought in consequence to charge some party as principal, because he initiated the proceedings under which the alleged wrong was inflicted.

Ministerial and judicial proceedings.

Legal proceedings may be either ministerial or judicial. In case of the former, the party employs the machinery of the law entirely at his own risk, and is directly responsible for the consequences. In case of the latter, he appeals to the discretion of some judge or magistrate, and the steps thereupon taken result immediately from the exercise of that discretion and not from the act of the party (*a*). Under such circumstances a man may indeed be liable in an action of malicious prosecution if he has wrongfully set the law in motion, but he cannot be sued in an action of trespass, which is only the remedy for a direct and immediate wrong.

If a party is arrested without a warrant and taken before a magistrate, who thereupon remands him, he must seek his remedy for the first imprisonment in an action of trespass, for the imprisonment on remand in an action for malicious prosecution (*b*).

The distinction between a ministerial and judicial act is illustrated by the case of *Brown* v. *Chapman* (*c*). The plaintiff had gone before a magistrate voluntarily to meet any charge which the defendant might bring against him. The magistrate declined to deal with the case unless a definite charge was made. The

(*a*) *Austin* v. *Dowling*, (1870) L. R. 5 C. P. 534.

(*b*) *Lock* v. *Ashton*, (1843) 12 Q. B. 871.

(*c*) (1848) 6 C. B. 365.

defendant said that the plaintiff had been embezzling. The magistrate said, "Do you give him into custody?" The defendant replied, "I do give him into custody." It was held that he was not liable in an action of trespass, because the imprisonment was the judicial act of the magistrate. "The particular expression," said the Court, "which alone can properly be argued to be evidence of an authority given by the defendant for the imprisonment of the plaintiff was addressed to the magistrate, and no other person could properly act upon it; and we think that such an expression used by a party to a magistrate in the course of preferring a charge cannot be considered as constituting the magistrate the agent of the suitor or as calling upon him to act ministerially upon the authority of such suitor" (*a*). On the same principle, if the authorities of a foreign State acting on their own judgment corporally punish a man, no action of trespass lies against the instigator of the proceedings, however wrong or malicious his conduct may have been. In *Raphael* v. *Verelst* (*b*), however, where the plaintiff had been imprisoned by a sovereign Indian prince, who, as the jury found, "was under the awe and influence of the defendant and acted contrary to his own inclination, being fearful of offending him," it was held that, the prince having acted merely as agent of the defendant, the latter was answerable in trespass. In *Aitken* v. *Bedwell* (*c*) the plaintiff had been handed over by his captain, the defendant, in a Russian port to the authorities on a charge of misconduct. After some days he was brought out and flogged by Russian soldiers, the defendant standing by and ordering the punishment. It was left to the jury to say "whether the punishment was done by the constituted authorities on the mere complaint of the defendant, or whether the defendant was the actor and immediate promoter."

Arrests by ministerial officers.

If the arrest or other trespass is effected by a purely ministerial officer and not under the authority of any Court, the defendant must clearly be answerable if he in fact authorised the act in question. It is not necessary that he should in terms have made a request or demand; it is enough if he makes a charge on which

(*a*) 6 C. B. p. 376.
(*b*) (1776) 2 W. Bl. 1055.
(*c*) (1827) 1 M. & M. 68.

it becomes the duty of the constable to act (*a*). But it is quite a different thing if a party simply gives information, and the constable thereupon acts according to his own judgment, and in such a case the informer incurs no responsibility (*b*).

If a person signs the charge-sheet after an arrest has been made he thereby creates strong *primâ facie* evidence against himself as having authorised the proceeding (*c*), but such an act does not make him necessarily responsible for the arrest. Thus where a constable having taken the plaintiff into custody on his own judgment, requested the defendant to sign the charge-sheet, and the defendant did so, it was held that there was no evidence to make him liable for the imprisonment (*d*); it being essential in order to make a defendant liable, on a charge of malicious prosecution, for the plaintiff to show, not only that the defendant was wrong, but also that he was wilfully and maliciously so (*e*).

Judicial acts.

There is not only a distinction between the act of a ministerial officer such as a policeman and the act of a judicial officer such as a magistrate, but there is a distinction between the ministerial and judicial acts of Courts of justice. That is strictly speaking a judicial act which follows in the ordinary course of procedure from an order given by a judicial officer in the exercise of his functions. For such an act there is no remedy in trespass against the party initiating the proceedings. Even though the Court should act altogether outside its competence, yet still the party is protected, for he has a right to state his case and leave it to the Court to decide whether it has jurisdiction or not (*f*). It would probably, however, be otherwise if to the knowledge of the party the pro-

(*a*) *Hopkins* v. *Crowe*, (1836) 4 A. & E. 774.

(*b*) *Gosden* v. *Elphick*, (1849) 4 Ex. 445. In *Flewster* v. *Royle*, (1808) 1 Camp. 187, the defendant was held answerable in trespass for the wrongful seizure of the plaintiff by a pressgang in consequence of false information given by the defendant. This case was explained in *Gosden* v. *Elphick*, as having probably proceeded on the ground of the defendant's malice. Malice, however, could not well be the gist of an action of trespass.

(*c*) *Harris* v. *Dignum*, (1860) 29 L. J. Ex. 23.

(*d*) *Grinham* v. *Willey*, (1859) 4 H. & N. 496.

(*e*) *Darling* v. *Cooper*, (1869) 11 Cox, C. C. 533.

(*f*) *Carratt* v. *Morley*, (1841) 1 Q. B. 18; *West* v. *Smallwood*, (1838) 3 M. & W. 418; *Brown* v. *Chapman*, (1848) 6 C. B. 365. In case of a conviction under such circumstances proceedings would, however, lie against the justice for acting without jurisdiction (*Polley* v. *Fordham*), (1904) 2 K. B. 345.

Party personally intervening.

ceedings were altogether without colour of right. The absence of jurisdiction, however, makes this difference, that if the party, instead of leaving the orders of the Court to be carried out in the ordinary way by its officers, personally intervenes, as by superintending the execution of process, he then makes himself a trespasser (*a*). He only incurs this liability by participating in the very act itself; not by merely taking the necessary formal steps in accordance with the procedure of the Court to set its officers in motion (*b*).

Ministerial act of Court of justice.

Many proceedings are taken under the authority of Courts of justice, which are ministerial because they are not the consequence of a decision judicially given. Thus judgment may be given by default on the production of certain formal evidence, and this judgment, though in one sense the act of the Court, is in another sense the act of the party, and he may be directly responsible in trespass for anything done to carry it out. If the order of the Court was altogether without jurisdiction it can serve as no protection whatever (*c*). If it was within the jurisdiction of the Court, however irregular, it protects all proceedings duly taken in pursuance of it, until it is set aside (*d*). An order of a Court may be set aside on the ground of error, as a matter of favour, or because it was irregularly obtained. There can only be error where there has been a judicial decision, and as has already been seen, anything done under a judicial decision cannot be a ground of trespass against a party, because it is not his act but the act of the Court. It is obvious that where an order is set aside as a matter of favour, the order is admitted to have been in itself a proper one, and it therefore gives validity to all proceedings taken while it was still in force. But an order obtained without judicial intervention and in an irregular or dishonest manner, when once set aside, is, so far as concerns the person thus obtaining it, as though it had never been made. It is for the party who seeks thus to deprive his adversary of the protection of the order

Setting aside proceedings.

(*a*) *Painter* v. *Liverpool Gas Co.*, (1836) 3 A. & E. 433. See *West* v. *Smallwood*, *supra*, p. 195. As to the cases where the party simply "acts in aid," see below, p. 210.

(*b*) *Cooper* v. *Harding*, (1845) 7 Q. B. 928.

(*c*) *Brooks* v. *Hodgkinson*, (1859) 4 H. & N. 712.

(*d*) *Riddell* v. *Pakeman*, (1835) 2 C. M. & R. 30.

to show on what ground it was annulled (*a*). Thus where a warrant of attorney had been given as an escrow, and nevertheless it was put in force and judgment entered up; where after proceedings had been commenced for the recovery of a debt it was paid, and nevertheless judgment was signed; where execution was issued against an executrix personally for her testator's debt; in all these cases the proceedings having been set aside, it was held that trespass lay in respect of the acts done under them (*b*). In *Williams* v. *Smith* (*c*), an attachment was obtained against the plaintiff on an affidavit of his disobedience to an order of the Court. He had given an excuse for his conduct to the defendant, which was afterwards held good, and the attachment was set aside. The defendant not thinking the excuse to be material, had made no mention of it in his affidavit. It was held that no action of false imprisonment lay against him.

Responsibility of solicitor.

Both the party and his solicitor are answerable for what is done under a process improperly taken out and subsequently avoided (*d*).

Remedy where proceedings cannot be set aside.

It is not in every case that irregular proceedings will be set aside. Thus where an execution has been taken out contrary to good faith for a sum greater than is really due, it is allowed to stand if in accordance with the judgment, but the injured party may have his remedy in an action on the case for any special damage caused (*e*). So formerly if a party had been wrongfully arrested on mesne process or after judgment on a *ca. sa.*, he did not apply to set the proceedings aside and recover for the false imprisonment, but alleged the arrest as a damage consequential on proceedings instituted maliciously and without reasonable or probable cause.

Imprisonment under judge's order.

The power of imprisonment in respect of debt, whether before or after judgment, now depends upon the provisions of 32 & 33 Vict. c. 62. It can only be exercised judicially and upon sworn

(*a*) *Smith* v. *Sydney*, (1870) L. R. 5 Q. B. 203.

(*b*) *Brown* v. *Jones*, (1846) 15 M. & W. 191; *Bates* v. *Pilling*, (1826) 6 B. & C. 38; *Barker* v. *Braham*, (1773) 3 Wils. 368; see *Parsons* v. *Lloyd*, (1772) *ibid.* 341.

(*c*) (1863) 14 C. B. N. S. 596.

(*d*) *Bates* v. *Pilling*, (1826) 6 B. & C. 38; *Barker* v. *Braham*, (1773) 3 Wils. 368; *Codrington* v. *Lloyd*, (1839) 8 A. & E. 449; and see *Edwards, Ex parte*, *Chapman, In re*, (1884) 13 Q. B. D. 747.

(*e*) *Gilding* v. *Eyre*, (1861) 10 C. B. N. S. 592; *Churchill* v. *Siggers*, (1854) 3 E. & B. 929. See Ch. XIX.

information. Therefore, however wrongfully and fraudulently the judge's order may have been obtained, it is nevertheless a purely judicial act, and consequently an arrest in pursuance of it cannot be a trespass, and the injured party must sue for maliciously and without reasonable and probable cause procuring the order (*a*).

Party personally intervening.

However, just as a party may make himself liable for what is done under process issued without jurisdiction by officiously intervening in its execution (*b*), so where the process is within the jurisdiction of the Court, if he takes on himself to give orders or directions to the officer entrusted with its execution, and in consequence of those orders and directions a wrongful act is committed, he will be liable, since he will have made the officer his agent to do that very thing (*c*). On the other hand, if he simply gives advice or information to the officer or urges him to do that which it is his duty to do, he does not therefore become the author of the subsequent proceedings (*d*).

What is an intervention.

It is not always very easy to draw a distinction between what is mere advice and what is a direction. The question is one of fact. In *Morris* v. *Salberg* (*e*), the plaintiff's goods had been seized under a writ of *fi. fa.* directed against his son. The solicitor of the defendant, the execution creditor, had indorsed on the writ, "The defendant is a gentleman who resides at Sarnau Park, Llandyssil, Cardigan, in your bailiwick." The address so given was that of the father, and not that of the son. The jury found that the sheriff seized the goods because he was misled by the direction given to him. It was held that the jury had found in effect that the sheriff had acted under the direction of the defendant, that the question was one for them, although it turned in reality on the construction of a written document. The plaintiff accordingly recovered judgment. If the execution creditor positively affirm to the officer of the Court that a certain person is the man, or that certain goods are the property of the man against whom the process issues, that amounts to an authority

(*a*) For instances of this kind of action, see *Petrie* v. *Lamont*, (1842) 3 M. & G. 702; *Ross* v. *Norman*, (1850) 5 Ex. 359. See Ch. XIX.

(*b*) See above, p. 196.

(*c*) *Sowell* v. *Champion*, (1837) 6 A. & E. 407.

(*d*) *Cashaw* v. *Chapman*, (1862) 7 H. & N. 911.

(*e*) (1889) 22 Q. B. D. 614. This case overrules *Childers* v. *Wooler*, (1859) 2 E. & E. 287.

to the officer, and the creditor is answerable for the consequences of obeying his direction (*a*).

No ratification of unlawful proceedings.

If no previous authority has been given a party does not become liable by subsequently availing himself of the execution. A man can only ratify where the act has been done at the time in his name. But a ministerial officer of justice purports to act in the name of the Court to which he belongs and not in the name of the suitor (*b*).

Justification of trespass.

A trespass to the person may be justified on the ground (1) that the defendant was acting in defence of his person or property; (2) that he was stopping a breach of the peace, putting down a riot, or apprehending an offender against the criminal law; (3) that the plaintiff had escaped from lawful custody; (4) that the defendant was acting in aid of officers of the law; (5) that the plaintiff was in such a state as to be dangerous to himself and others; (6) that the defendant was administering reasonable chastisement in the exercise of parental or other authority. In all these cases what is *primâ facie* a wrongful act is committed under the authority of the law, and if this authority is abused, it altogether fails as a protection, and the party is liable not merely in respect of the way in which he exceeded his right, but also of all that he did in exercise of the right. He is said to be a trespasser *ab initio*, on the assumption that his subsequent misconduct evidences an intention from the first to commit unlawful acts under the colour of a lawful authority (*c*). This artificial assumption in many cases does not accord with the real justice of the case. If a schoolmaster unmercifully beats a pupil, it is reasonable enough that he should be made to pay damages as for an entirely unauthorised assault, without taking into account the fact that he was entitled to inflict some punishment. But if a person having taken a horse under distress *damage feasant*, subsequently works it, it would appear more just to exact from him adequate compensation than to make him liable in trespass for the original taking as unlawful *ab initio*.

(*a*) *Humphrys* v. *Pratt*, (1831) 5 Bligh. N. R. 154; *Walley* v. *M'Connel*, (1849) 13 Q. B. 903.

(*b*) *Wilson* v. *Tumman*, (1843) 6 M. & G. 236; *Woollen* v. *Wright*, (1862) 1 H. & C. 554. As for the responsibility of officers of justice whether judicial or ministerial, see Ch. XXII.

(*c*) *Six Carpenters' case*, (1610) 8 Rep. 146 a.

If A. being in lawful custody is detained after he has acquired a right to discharge, this, as has already been seen, is treated as a fresh imprisonment, and does not make the prior imprisonment unlawful, for it is said that in such a case unlawful prolongation cannot have been contemplated on the original arrest (*a*).

Use of force in defence of person or property.

1. The question of the lawfulness of the use of force in defence of person or property is considered elsewhere (*b*).

In support of criminal law.

2. The right and duty of using force towards, and apprehending without warrant, persons offending or suspected of offending against the criminal law is given both by common law and statute, in some cases to all members of the public, in others to owners and custodians of property, in others to persons filling certain special positions, and in particular to officers of the peace (*c*).

In cases of breaches of the peace.

Any person may forcibly interpose to stop a breach of the peace while continuing, or to prevent its renewal. He may apprehend any one engaged in breaking the peace, and having done so, it is his duty to hand over the prisoner to a constable or himself to take him before a justice of the peace, who may enquire into the matter and bind over the offender to keep the peace or otherwise deal with him according to the law (*d*). But the person so interposing is only justified if he himself is the witness of the disturbance; he cannot act on the information of others (*e*). "It is unquestionable that any bystander may and ought to interfere to part those who make an affray and to stay those who are going to join in it, till the affray be ended. It is also clearly laid down that he may arrest the affrayers and detain them until the heat be over, and then deliver them to a constable. . . . And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is

(*a*) *Smith* v. *Egginton*, (1837) 7 A. & E. 167. See also as to illegal detention subsequent to an originally lawful custody, *Mee* v. *Cruikshank*, (1902) 86 L. T. 708.

(*b*) See above, pp. 150–154.

(*c*) As to this last class of persons, see Ch. XXII.

(*d*) Larceny Act, 1861, s. 103, and see *Griffith* v. *Taylor*, (1876) 2 C. P. D. 194.

(*e*) A constable on the other hand can act on what he hears (see Ch. XXII.), though at common law he is not entitled to arrest for a mere assault that he has not witnessed (*Coupey* v. *Henley*, (1797) 2 Esp. 540).

over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth while those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue" (*a*). But when once the danger is over the right is gone (*b*). If a man having committed a breach of the peace runs off, he cannot without warrant be apprehended, however fresh the pursuit and immediate the capture.

It is not necessary for a bystander who finds two people fighting together to enquire which was the aggressor. He may arrest either of them if it is reasonably requisite to do so in order to prevent a continuance of the affray (*c*).

What is a breach of the peace.

A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. Thus a householder—apart from special police legislation—cannot give a man into custody for violently and persistently ringing his door-bell (*d*). But it is a breach of the peace to collect a number of persons before a man's house and to use violent and abusive language, or otherwise behave in a disorderly manner, because public excitement may be thereby created and a riot ensue (*e*). It is not a sufficient justification of an arrest to plead that the plaintiff was "in heat and fury ready and desirous to make an affray and commit a breach of the peace," but the plea is good if it allege that his conduct was such as to alarm and disquiet the neighbourhood (*f*). Mere noise and inter-

(*a*) *Per Cur. Timothy* v. *Simpson*, (1835) 1 C. M. & R. pp. 762–3.

(*b*) *Baynes* v. *Brewster*, (1841) 2 Q. B. 375.

(*c*) *Timothy* v. *Simpson*, (1835) 1 C. M. & R. 757; *Baynes* v. *Brewster*, (1841) 2 Q. B. 375.

(*d*) *Grant* v. *Moser*, (1843) 5 M. & G. 123.

(*e*) *Cohen* v. *Huskisson*, (1837) 2 M. & W. 477; *Ingle* v. *Bell*, (1836) 1 M. & W. 516; *Webster* v. *Watts*, (1847) 11 Q. B. 311.

(*f*) *Wheeler* v. *Whiting*, (1840) 9 C. & P. 262; *Howell* v. *Jackson*, (1834) 6 C. & P. 723.

ruption at a public meeting do not of themselves constitute a breach of the peace, but it is otherwise if the disturbance amount to the obstruction of a public officer in the execution of his duty (*a*).

Degree of force lawful.

It is only lawful to use such violence as is reasonably necessary to restrain the offending party from executing further disturbance. The proper plea is that in the first instance the defendant *molliter manus imposuit* (*b*).

But in place of public tumult and violence it is the right and duty of all citizens to unite in putting it down, and for this purpose to use all necessary force, even to the taking of life. "Every one is bound to aid in the suppression of riotous disturbances. The degree of force which may be lawfully used in their suppression depends upon the nature of such riot, for the force used must always be moderated and proportional to the circumstances of the case and of the end to be obtained. The taking of life can only be justified by the necessity for protecting persons and property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act and who resist the attempt to disperse or apprehend them" (*c*).

Use of military forces.

If the military forces of the Crown are employed in suppressing a riot their *status* is that of ordinary citizens. The fact that they possess special arms and organisation is simply a reason for not lightly employing them (*d*). It is sometimes supposed that it is never lawful to fire at a mob until the Riot Act has been read, or, at any rate, until a magistrate's order has been given. This, however, is erroneous. "No officer is justified by English law in standing by and allowing felonious outrage to be committed merely because of a magistrate's

(*a*) *Spilsbury* v. *Micklethwaite*, (1808) 1 Taunt. 146; *Wooding* v. *Oxley*, (1839) 9 C. & P. 1. As to what amounts to obstructing apprehension, see *Reg.* v. *Green*, (1861) 8 Cox, C. C. 441.

(*b*) Bullen & Leake, 3rd ed. p. 797. As to justification for handcuffing see *Reg.* v. *Taylor*, (1895) 59 J. P. 393.

(*c*) Report on the Featherstone Riots, pp. 9, 10, Parliamentary Papers, 1893. The late Lord Bowen was the principal author of this Report.

(*d*) *Ibid.* See *R.* v. *Pinney*, (1832) 5 C. & P. 254; *Redford* v. *Birley*, (1822) 3 Stark. 76.

absence. . . . An order from a magistrate who is present is required by military regulations (*a*), and wisdom and discretion are entirely in favour of such a practice. But the order of the magistrate at law has no legal effect. Its presence does not justify the firing if the magistrate is wrong, its absence does not excuse the officer in declining to fire when the necessity exists" (*b*).

It must frequently happen that in the suppression of a riot the innocent suffer along with the guilty. But if the force used is reasonable and proper under the circumstances, the person employing it is none the less protected, though he may cause damage to one entirely guiltless of participation in the misconduct of the mob (*c*).

Where felony committed.

If a felony or treason has in fact been committed, it is lawful to arrest and take before the magistrate any one suspected on reasonable and probable grounds of being the guilty person (*d*). The question of reasonableness is one for the judge to decide as in an action of malicious prosecution (*e*), but the burden of proof is different. A defendant who justifies an arrest has to prove affirmatively that he acted on good grounds (*f*). A plaintiff who alleges himself injured by a legal process has to establish a negative, and show that the proceedings against him were destitute of foundation. It is an *à fortiori* case that an actual felon may be arrested, and for this purpose it appears that after demand and refusal it is lawful to break open the outer door of a dwelling-house (*g*).

To prevent deadly injury, treason or felony.

It is lawful to arrest in order to prevent a deadly injury being inflicted, or a treason or felony being committed, and in this case also an outer door may be broken for the purpose of effecting the arrest (*h*). But as this power is given rather for the prevention

(*a*) Queen's Regulations, 1892, sec. 8, par. 63.

(*b*) Report on the Featherstone Riots, p. 10.

(*c*) See *Baxter* v. *Oliver*, Times, June 17th, 1892.

(*d*) 2 Inst. p. 52, *per* Lord Tenterden, *Beckwith* v. *Philby*, (1827) 6 B. & C. p. 638. A constable can act on reasonable suspicion even though no offence has been committed. *Ibid.* See Ch. XXII.

(*e*) *Lister* v. *Perryman*, (1870) L. R. 4 H. L. 521. As to what is reasonable, see Ch. XIX.

(*f*) *Allen* v. *Wright*, (1838) 8 C. & P. 522; *Hanson* v. *Waller*, (1901) 1 K. B. 390.

(*g*) Hale, P. C., Vol. 2, pp. 77 *sqq.*; Fost. C. C. 320.

(*h*) *Handcock* v. *Baker*, (1800) 2 B. & P. 260; Hawkins, P. C., 7th ed., Vol. 3, p. 183.

than for the punishment of crime, it would seem that unless the arrested person has actually broken the peace he cannot be detained after the danger is over.

In case of misdemeanour.

There is no authority at common law to arrest without warrant on suspicion of misdemeanour, although a misdemeanour has in fact been committed, nor although the party arrested be actually guilty (*a*). It is indeed said in Hawkins' Pleas of the Crown that in certain cases an offending party may be detained if caught in the act (*b*). There appears, however, to be no case in which this statement of the law has been acted upon. It is also said that suspicious nightwalkers may be arrested (*c*), but this again can hardly be accepted as an accurate statement of the law in the present day. However, by statute very extensive power is given to private individuals of arresting in case of misdemeanour. By the Vagrant Act (*d*) any person may apprehend any person found offending against the Act, and forthwith take him before a justice of the peace or deliver him to a constable. By 9 Geo. IV. c. 69, s. 2, night (*e*) poachers found committing the offence may be arrested either immediately or on pursuit by owners and occupiers of land, lords of manors, and their servants, and taken before a magistrate. By 1 & 2 Will. IV. c. 32, s. 31, any person found trespassing in pursuit of game at any time may be required to give his name and quit the land. If he refuses to do either he may be arrested by persons occupying or possessing sporting rights over land, and their servants, and taken before a magistrate.

Statutory powers.

Vagrant Act.

Poaching.

Lighting and watching.

By the Lighting and Watching Act (*f*) persons who wilfully damage lamps and other property may be apprehended by persons witnessing the offence and handed over to a constable.

Highway Act.

By the General Highway Act (*g*) offenders against the Act whose names are unknown may be apprehended by or under the authority of surveyors of highways or by persons witnessing the offence and taken before a magistrate. Offenders

(*a*) *Per* Tindal, C.J., *Mathews* v. *Biddulph*, (1841) 3 M. & G. p. 395. See *Fox* v. *Gaunt*, (1832) 3 B. & Ad. 798; East, P. C., Vol. 1, p. 303.

(*b*) Vol. 2, p. 120.

(*c*) *Ibid.*; and see *Lawrence* v. *Hedger*. (1810) 3 Taunt. 14.

(*d*) 5 Geo. IV. c. 83, s. 6.

(*e*) The time is defined by s. 12.

(*f*) 3 & 4 Will. IV. c. 90, s. 55.

(*g*) 5 & 6 Will. IV. c. 50, ss. 78, 79.

against s. 78 may be apprehended by those witnessing the offence.

Masters of workhouses.

By the Poor Law Amendment Act (*a*) masters of workhouses and persons acting on their authority may apprehend persons bringing into a workhouse without authority spirituous or fermented liquors, and take them before a magistrate.

Metropolitan Police Acts.

By 2 & 3 Vict. c. 47, s. 66 (one of the Metropolitan Police Acts), "any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction" under the Act . . . "may be apprehended by the owner of the property on or in respect to which the offence shall be committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law." There is a corresponding provision in the Towns Police Clauses Act (*b*).

Towns Police Clauses Act.

Canal Act.

By the Canal Act (*c*) persons found committing any offence punishable under the Act by summary conviction may be apprehended by the owners of property with respect to which such offence shall be committed, or by their servants or agents, and handed over to a constable. If property is offered to any person and he reasonably suspects that any such offence under the Act has been committed with respect to it, or that it has been stolen or unlawfully obtained, he may apprehend the party offering the property and hand him over to a constable.

Indictable offences at night.

By 14 & 15 Vict. c. 19, s. 11, any person may arrest "any person who shall be found committing" any indictable offence at night (*d*), and may "convey him or deliver him to some constable or other peace officer."

Larceny Act.

Any person "found committing" any offence punishable by virtue of the Larceny Act (*e*), with the exception of the offence of angling in the daytime, "may be immediately apprehended without a warrant by any person and forthwith taken . . . before some neighbouring justice of the peace," "and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence had been committed on or with

(*a*) 4 & 5 Will. IV. c. 76, s. 92.
(*b*) 10 & 11 Vict. c. 89, s. 15.
(*c*) 3 & 4 Vict. c. 50, ss. 11, 12.
(*d*) *I.e.*, between 9 p.m. and 6 a.m., see s. 13.
(*e*) 24 & 25 Vict. c. 96, s. 103. See, too, 38 & 39 Vict. c. 25, s. 12, as to naval stores, &c.

respect to such property," is authorised and required to apprehend the party offering the property, and to take him and it before a justice. Similar powers are given against any person

Injuries to Property Act.

" found committing " an offence punishable under the Malicious Injuries to Property Act to " the owner of the property injured or his servant or any person authorised by him " (*a*).

Coiners Act.

Any person may apprehend any person " found committing any indictable offence against the Coinage Act and hand him over to an officer of the peace " (*b*).

Pedlars Act.

By the Pedlars Act (*c*) any person on whose ground a pedlar is, or to whom he offers goods, may demand inspection of his certificate, and on refusal may arrest and take him before a magistrate.

Prevention of Crimes Act.

By the Prevention of Crimes Act (*d*), owners and occupiers of property and their tenants may arrest and hand over to a constable persons twice previously convicted whom they find on their property and who give an unsatisfactory account of themselves.

Pawnbrokers Act.

By the Pawnbrokers Act (*e*) a pawnbroker reasonably suspecting (*f*) that an article offered in pawn to him has been stolen or otherwise illegally and clandestinely obtained, may seize and detain and deliver as soon as may be to a constable the article itself and the person offering it or either of them.

Army Act.

Under the Army Act (*g*) " upon reasonable suspicion that a person is a deserter " he may be apprehended by any constable, and in the absence of a constable by any person and taken forthwith before a magistrate.

Explosives Act.

By the Explosives Act (*h*) persons found committing offences against the Act under circumstances of danger may be arrested by the occupiers of endangered property, local authorities, and the servants of railway and canal companies.

Prevention of Cruelty to Children Act, 1904.

By the Prevention of Cruelty to Children Act, 1904 (*i*), any constable may take into custody, without warrant, any person who within view of such constable commits an offence against the Act.

(*a*) 24 & 25 Vict. c. 97, s. 61.
(*b*) 24 & 25 Vict. c. 99, s. 31.
(*c*) 34 & 35 Vict. c. 96, s. 18.
(*d*) 34 & 35 Vict. c. 112, s. 7.
(*e*) 35 & 36 Vict. c. 93, s. 34.
(*f*) See *Howard* v. *Clarke*, (1888) 20 Q. B. D. 558.
(*g*) 44 & 45 Vict. c. 58, s. 154.
(*h*) 38 & 39 Vict. c. 17, s. 78.
(*i*) 4 Ed. VII. c. 15, s. 4.

Found committing.

It will be observed that in nearly all these statutes it is a condition of the power to apprehend that the person apprehended should have been "found committing" some offence or "found offending." He must be detected in the physical perpetration of the crime (*a*). Thus when the gist of the offence is the state of the man's mind, or where the offence is one of omission, there is no power of summary arrest. A man cannot, for example, well be found committing the offence of embezzlement or of neglecting to maintain his family (*b*). The person who discovers the act must be aware of its criminality at the time. If A. sees B. taking away property and from what he afterwards hears from C. discovers that B. was guilty of larceny, A. does not find B. committing the larceny (*c*). A man cannot be found committing an offence which he is merely attempting to commit (*d*). He must be detected at its completion or during its continuance. A thief who is found in possession of stolen property during the continuance of the asportation, however long, is found committing the theft (*e*). The offender must be either apprehended in the very act or at any rate must be immediately pursued. "Suppose a party seen in the act of committing a crime were to run away and immediate and fresh pursuit to be made, I think that would be sufficient" (*f*). It will be observed that in some of the statutes authority is given "immediately" to apprehend, while in others the word "immediately" does not occur. There seems, however, to be no practical difference between the two classes of enactments. In both the intention is to enable parties who discover a criminal at work to act then and there. What is an immediate apprehension is a question of fact for the jury (*g*). If the pursuit be sufficiently fresh it does not appear to be material that the offender is not actually apprehended by the person who found

(*a*) It is insufficient to justify arrest for the offence to have been committed very recently (*Griffith* v. *Taylor*, (1876) 2 C. P. D. 194).

(*b*) *Field* v. *Musgrove*, (1867) 16 L. T. N. S. 536; *Horley* v. *Rogers*, (1860) 2 E. & E. 674.

(*c*) See *Downing* v. *Capel*, (1867) L. R. 2 C. P. 461.

(*d*) *Leete* v. *Hart*, (1868) L. R. 3 C. P. 322.

(*e*) *Griffith* v. *Taylor*, (1876) 2 C. P. D. 194.

(*f*) *Per* Tindal, C.J., *Hanway* v. *Boultbee*, (1830) 1 Moo. & R. p. 19; see *Rex* v. *Howarth*, (1828) 1 Moo. C. C. 207; *Downing* v. *Capel*, (1867) L. R. 2 C. P. 461; *Griffith* v. *Taylor*, (1876) 2 C. P. D. 194.

(*g*) *Griffith* v. *Taylor*, *supra*.

Owner of property.

him offending (*a*). In certain cases of offences against property the owner and his agents are allowed to arrest. The word "owner," it is apprehended, would include generally a possessor.

Brawling in place of worship.

By 23 & 24 Vict. c. 32, s. 2, riotous and indecent behaviour in any church or registered place of worship and interruption of an officiating minister are offences punishable on summary conviction. By s. 3 of the same Act offenders may be immediately apprehended by a churchwarden of the place and taken before a magistrate (*b*). It appears, however, that in the absence of indecorous conduct a request to leave is a necessary preliminary to ejectment (*c*).

Offences in respect of passenger steamers.

By 57 & 58 Vict. c. 60, s. 287, the master or other officer of any duly surveyed passenger steamer, and any person called by him to his assistance, may apprehend and take before a magistrate any person of unknown name and address who is guilty of evading payment of fares, injuring the vessel, molesting the passengers or crew, or of certain other kinds of disorderly conduct defined by the Act.

Offences against railway companies.

By 8 & 9 Vict. c. 20, ss. 103 (*d*), 104, 154, and 52 & 53 Vict. c. 57, s. 5, power is given to the officers and servants of railway companies to arrest persons whose names and addresses are unknown, or who refuse to give their names and addresses, and who have committed certain specified offences, such as refusing to pay their fares, deliver up tickets, etc.

By the Tramways Act (*e*) servants of tramway companies may arrest and take before a magistrate passengers committing or attempting to commit frauds, if their names and addresses are unknown (*f*).

Duty of party arresting.

Whenever power of summary arrest on a criminal charge is given it is for the purpose of immediate investigation before a magistrate, and no arrest can be justified which is not for this purpose (*g*). It is a bad plea to say that a felony had been

(*a*) See *Downing* v. *Capel*, *supra*, p. 207.

(*b*) As to what constitutes the offence, see *Kensit* v. *St. Paul's Dean and Chapter*, (1905) 2 K. B. 249; *Williams* v. *Glenister*, (1824) 2 B. & C. 699; *Cope* v. *Barber*, (1872) L. R. 7 C. P. 393.

(*c*) *Ballard* v. *Bond*, (1837) 1 Jur. 7.

(*d*) The first part of this section is repealed by the Statute Law Revision Act of 1892.

(*e*) 33 & 34 Vict. c. 78, s. 52.

(*f*) In this connection see *Wilson* v. *Fearnley*, (1905) 69 J. P. 165.

(*g*) For statutory rule in cases of arrest without warrant see s. 38, Summary Jurisdiction Act, 1879.

committed, that there was reasonable and probable cause for suspecting the plaintiff and that he was arrested and taken to a certain spot for identification (*a*). It is not lawful to detain a man in custody without warrant while evidence against him is being collected, since it is for the magistrate to grant a remand if the case is not ripe for hearing (*b*). The statutes authorising arrests without warrant generally provide that the arrested party shall be taken immediately or forthwith before a justice of the peace, but these provisions are only declaratory of the common law (*c*). So jealous is the law on this point that if the prisoner be conducted by a circuitous instead of the ordinary direct road he may recover for a false imprisonment (*d*). No greater restraint may be placed on a prisoner than is necessary for his safe detention. If there be reasonable apprehension of a rescue or escape he may be handcuffed, but not otherwise (*e*).

Escape from custody.

3. A person who has escaped from lawful custody is still considered theoretically a prisoner, and his recapture is but a continuance of his former imprisonment (*f*). It may therefore be effected without the restrictions as to time or place which may have been attached to the original execution of the process against him. Thus a sheriff may not enforce a civil writ on a Sunday, but he may on that date retake a person who, being in custody by virtue of such a writ, has escaped (*g*). So a person privileged from arrest is not privileged from recapture (*h*). So in effecting a recapture, at any rate upon a fresh pursuit, it is lawful to break open the outer door of a dwelling-house (*i*). And, on this principle, it was held that where a party had been formally arrested by touching him through a broken window it was lawful thereupon to break into the house in order to

(*a*) *Hall* v. *Booth*, (1834) 3 N. & M. 316.

(*b*) *Wright* v. *Court*, (1825) 4 B. & C. 596.

(*c*) A person arrested under the Game Act, 1 & 2 Will. IV. c. 32, s. 31, must be discharged unless brought before a justice in twelve hours. For rule in extradition cases see 33 & 34 Vict. c. 52, s. 8, and *Reg.* v. *Weil*, (1882) 9 Q. B. D. 701.

(*d*) *Morris* v. *Wise*, (1860) 2 F. & F. 51; *O'Brien* v. *Brabner*, (1885) 49 J. P. 227.

(*e*) *Reg.* v. *Taylor*, (1895) J. P. 393 and *Wright* v. *Court*, *supra*.

(*f*) *Anon.*, (1704) 6 Mod. 231.

(*g*) *Ibid.*

(*h*) *Ex parte Lyne*, (1822) 3 Stark. 132.

(*i*) Fost. C. C. 320; East, P. C. Vol. 1, p. 324; *Genner* v. *Sparks*, (1704) 6 Mod. 173.

effect his actual apprehension (*a*). A principal is always considered to be in the custody of his bail, and the bail may discharge himself at any time by making the custody actual and handing over his prisoner to the custody of the law. In so doing he has the same licence of procedure as in any other recapture (*b*).

Assisting officers of the law.

4. If a private individual acts as the mere servant or assistant of a constable or other officer engaged in effecting an arrest or carrying out any other process of the law, and the circumstances are such as to justify the conduct of the officer, the person assisting will also be justified, although he would not have been entitled to act by himself, for it cannot be unlawful to take part in a lawful act. And it may sometimes happen that a man may be justified in actually directing an arrest which it would have been unlawful for him to effect personally. If A. suspect B. of felony, no felony having in fact been committed, and thereupon make a charge against him to C., a constable, who in consequence arrests, C. is justified, because he had a right to act on A.'s information, but A. is not (*c*). But if C. reasonably suspect B. apart from any information supplied by A., then he can make the arrest on his own authority; and if under such circumstances A. give B. in charge to C., he does not become thereby the originator of the arrest. He simply calls upon C. to do what C. would apart from any such invitation be authorised and bound to do, and if liable at all is only liable to the same extent as C. So if a constable have a right to arrest for a breach of the peace, a bystander who calls upon him to do so is not liable, although the circumstances might not have justified the bystander had he made the arrest himself (*d*).

Statutory protection.

The protection (*e*) given by 24 Geo. II. c. 44, s. 6, to constables and other officers executing invalid warrants of magistrates, and by 51 & 52 Vict. c. 43, s. 54, to county court officers executing invalid process of the county court, includes

(*a*) *Sandon* v. *Jervis*, (1858) E. B. & E. 935 and 942.

(*b*) *Anon.*, (1704) 6 Mod. 231; *Ex parte Lyne*, *supra*, p. 209.

(*c*) *Hedges* v. *Chapman*, (1825) 2 Bing. 523.

(*d*) *Derecourt* v. *Corbishley*, (1855) 5 E. & B. 188.

(*e*) See Ch. XXII.

private individuals acting by the order and in the aid of such officers. The language would appear to point rather to the case of persons who act in a subordinate capacity as mere assistants and who do not take upon themselves to direct the proceedings (*a*).

Lunatics.

5. A private person may without an express warrant confine a person disordered in his mind who seems disposed to do mischief to himself or any other person (*b*). There is no power at common law to apprehend or detain a lunatic simply because he is a lunatic. It has been already pointed out that it is always lawful to use such force as to prevent a deadly act of violence being done, and it seems to be simply an exemplification of this principle that a person, whose state of mind is such from frenzy and delirium as to render him a standing danger to others and himself, may be subjected to such restraint as is necessary to prevent that danger (*c*).

Detention orders.

The permanent care and control of lunatics is regulated by the Lunacy Act, 1890 (*d*). Their detention (*e*) must as a rule take place under a detention order made by the judicial authority defined by the Act (*f*). But in cases of urgency the lunatic can be detained for a short time under an urgency order signed by a private individual and accompanied by a medical certificate (*g*). A judicial reception order must be made upon petition (*h*), but pauper lunatics, wandering lunatics, and

(*a*) Cp. *Painter* v. *Liverpool Gas Co.*, (1836) 3 A. & E. 433. In *Nathan* v. *Cohen*, (1812) 3 Camp. 257, the defendant had caused a warrant to issue against the plaintiff, directed to three constables, had gone with them and pointed out the plaintiff as the person to be arrested. Lord Ellenborough held that he was within the protection of 21 Jac. I. c. 16, s. 5, which speaks of certain officers and those who act "in their aid and assistance *or* by their commandment," the words being disjunctive. In the statutes referred to in the text, the act for which protection is claimed must have been by the order and also in aid of the officer.

(*b*) Bac. Ab. Trespass, D. 3.

(*c*) *Per* Lord Mansfield, *Brookshaw* v. *Hopkins*, (1772) Lofft, p. 243; see *Re Greenwood*, (1855) 24 L. J. Q. B. 148. In *Fletcher* v. *Fletcher*, (1859) 1 E. & E. 420, the Court used general language which might seem to convey the notion that the mere fact of lunacy justified the confinement of the sufferer. The judges did not, it is conceived, mean this. The distinction between harmless and dangerous lunatics was not material for them to consider.

(*d*) 53 & 54 Vict. c. 5, as amended by the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

(*e*) As to the removal to the place of detention, see s. 35.

(*f*) ss. 9, 10.

(*g*) s. 11.

(*h*) s. 4; as to procedure thereon, see ss. 5—8.

lunatics not properly cared for, may be confined under orders made in a summary way (*a*). The requirements of the Act must be strictly complied with, and failure in any particular entitles the person detained to be discharged upon *habeas corpus*, provided this can be done without danger to himself or others (*b*). Thus a medical certificate which is not in substantial accordance with the form provided in the Act is altogether invalid (*c*).

An urgency order remains in force only for seven days (*d*). A judicial order is in force for a year, and may thereafter be from time to time continued in the manner provided by the Act (*e*). A patient may at any time be discharged on a writ of *habeas corpus* if the Court is satisfied that he is not a fit person to be detained (*f*), or by the order of the Lunacy Commissioners (*g*), or of the visitors of an asylum, whether private or public (*h*). The persons on whose petition a reception order is made, or the authority liable for the maintenance of a pauper lunatic, may direct his discharge (*i*). It is further the duty of the custodian of a patient upon the patient's recovery to give due notice to the persons responsible, and thereupon to discharge the patient at the end of seven days if he is not removed in the interval (*k*).

Execution of deed by lunatic.

It may be convenient to mention that the execution by a lunatic, so found by inquisition, of any deed or instrument disposing of his property, even if the deed be executed in a lucid interval, is altogether invalid so long as the inquisition is not superseded (*l*).

Recaption.

If a person lawfully in custody under a reception order escapes,

(*a*) ss. 13—21. As to lunatics found so by inquisition, see s. 12.

(*b*) See *Re Greenwood*, (1855) 24 L. J. Q. B. 148.

(*c*) See *Re Greenwood*, *supra*; *Lowe* v. *Fox*, (1885–7) 12 App. Cas. 206.

(*d*) s. 11 (6).

(*e*) s. 38.

(*f*) See *per* Parke, B., *Norris* v. *Seed*, (1849) 3 Ex. p. 792.

(*g*) s. 75.

(*h*) ss. 77, 78. But an order for a patient's discharge does not act as an automatic discharge of an order of Court appointing a receiver and manager of the patient's property (*B. A. S., In re*, (1898) 2 Ch. 392).

(*i*) ss. 72, 73. But in spite of such order there is power to detain the patient if dangerous (s. 74). As to what amounts to an order of discharge, see *Lowe* v. *Fox*, (1885–7) 12 App. Cas. 206.

(*k*) s. 83.

(*l*) *Walker, In re*, (1905) 1 Ch. 160, C. A.; as to the execution of a power of attorney by a lunatic in a lucid interval, see *Daily Telegraph Newspaper Co.* v. *M'Laughlin*, (1904) A. C. 776.

the custodian may cause him to be recaptured at any time within fourteen days from the time of the escape, without any fresh order or certificate (*a*).

Means of restraint.

It is unlawful to use mechanical means of bodily restraint against a patient "unless the restraint is necessary for purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others" (*b*).

Effect of reception order.

A reception order good on the face of it is a sufficient authority for the reception and detention of a lunatic at the place named in the order, and "the order may be acted on without further evidence of the signature or of the jurisdiction of the person making the order" (*c*).

Statutory protection.

It is further provided that any person presenting a petition, any person signing or carrying out or doing any act with a view to sign or carry out what is or purports to be a reception order or certificate, and finally any person doing anything in pursuance of the Act, shall not be liable to any civil proceedings, whether on the ground of want of jurisdiction or on any other ground, if he has acted in good faith and with reasonable care (*d*).

There are several classes of persons with regard to whose conduct in the detention and restraint of alleged lunatics questions may arise, namely, persons making urgency orders, persons presenting petitions for reception orders, judicial authorities making reception orders, medical men signing certificates, and the persons actually in charge of the lunatics under reception orders and their subordinates.

Parties signing urgency orders.

A person who signs an urgency order is liable for the consequent imprisonment if, in fact, it is wrongful, either by reason of any irregularity of procedure, or because the state of mind of the person against whom the order is made is not such as to justify his detention (*e*). But this liability is limited by the provisions of s. 330.

(*a*) s. 85.

(*b*) s. 40.

(*c*) s. 35. In the corresponding section of the repealed Act (8 & 9 Vict. c. 100, s. 15), there are words enabling the order to be pleaded in answer to any action.

(*d*) s. 330. It is apprehended that the issue of good faith and reasonable care is on the plaintiff. See *Lowe* v. *Fox*, (1885-7) 12 App. Cas. 206.

(*e*) See *Fletcher* v. *Fletcher*, (1859) 1 E. & E. 420.

Parties procuring judicial orders.

A person who procures a reception order from a judicial authority is liable, it is apprehended, only to an action in the nature of an action of malicious prosecution, that is to say, if he has acted maliciously *and* without reasonable and probable cause. He has therefore a better protection by the common law than that which is given him by s. 330, which does not excuse a party who has acted in bad faith *or* unreasonably.

Judicial authority.

A judicial authority is only liable where there is absence of jurisdiction (*a*), and then subject to the provisions of s. 330.

Medical man.

A medical man signing a certificate is in no case liable to an action of false imprisonment, because the confinement of the supposed lunatic is not directly his act. He is only answerable, if at all, when he commits a breach of duty in giving a certificate without reasonable grounds, or in bad faith (*b*).

Keepers of asylums.

With regard to the persons having custody of lunatics under reception orders valid on the face of them, there seems some doubt whether such orders are an absolute protection (as they apparently were under 8 & 9 Vict. c. 100, s. 99), or whether, in spite of such orders, they do not act unlawfully in receiving and detaining persons whom they know to be entitled to their liberty (*c*). If the latter view is taken there would seem to be no difference between the protection afforded by an order good on the face of it, and that afforded by an order bad on the face of it, except that the apparent defects of an order may supply cogent evidence of negligence or bad faith (*d*).

The use of force towards a lunatic in a manner unnecessary or forbidden by the statute of course constitutes an assault. It is equally clear that a detention after the reception order has run out or otherwise been invalidated is a false imprisonment (*e*), subject to the provisions of s. 330. No doubt also an action would lie if any custodian of a lunatic neglected to give notice

(*a*) See Ch. XXII.

(*b*) See *Hall* v. *Semple*, (1862) 3 F. & F. 337.

(*c*) The manager of a hospital or licensed house is not bound by any public duty to receive any particular lunatic. S. 27 (4) expressly so provides with respect to lunatics sent under summary reception orders and orders of Commissioners, and *à fortiori* must it be so in the case of other lunatics.

(*d*) As to the statutory notices of reception required to be given by the keepers of private institutions licensed under the Lunacy Acts, see 54 & 55 Vict. c. 65, s. 20.

(*e*) And is also made a statutory misdemeanour by s. 222.

of the recovery of a patient and to liberate him as provided by s. 83.

Place of reception.

A reception order may be for the detention of a patient in an institution for lunatics, or as a single patient. An institution for lunatics, other than an asylum or hospital, means a licensed institution (*a*), and the order must state whether the lunatic is to be detained in an asylum, hospital, house, or as a single patient (*b*). It is apprehended that an order directing a lunatic's detention as a single patient would be no justification for any person detaining him in a place where other lunatics were kept. If the licence of the keeper of a lunatic asylum is revoked or expires, it would seem to follow that his whole authority is thereupon gone (*c*). Nor will *bonâ fide* belief, by the owner of a sanatorium, that persons under medical treatment therein are not insane justify their reception and detention, or avoid penalties, if such patients are found upon inquisition to be, in fact, lunatics (*d*).

Parental authority.

A father (or, with certain qualifications, a mother in the case of an illegitimate child (*e*)), has a right to the custody and control of the persons of his children up to the age of twenty-one years (*f*). This right does not vary in kind according to the age of the child, though no doubt an exercise of authority which might be just and lawful towards a child of tender years might be outrageous towards one approaching full age (*g*). He is entitled to prevent the child from leaving his roof against his will. And it makes no difference in this respect that the child is above the age (*h*) at which the Courts of Common Law refused to grant a *habeas corpus* to restore a child to its father's custody (*i*). Thus it has been

(*a*) s. 341.

(*b*) Schedule 2, form 3.

(*c*) S. 222 makes it a misdemeanour on the part of the keeper of a house if two months after the expiration or revocation of a licence there are two or more lunatics in the house.

(*d*) *Reg.* v. *Bishop*, (1880) 5 Q. B. D. 259.

(*e*) *Reg.* v. *Barnardo*, (1891) 1 Q. B. 194, C. A.

(*f*) Black. Com. Vol. 1, p. 453 ; *In re Agar Ellis*, (1883) 24 Ch. D. 317. This right, however, is not only liable to be forfeited by misconduct or abandonment, but also to be superseded by the superior right of the Crown as *parens patriæ* acting through the Court as its delegate, as to which see above, p. 4, note (*b*).

(*g*) *Per* Bowen, L.J., *In re Agar Ellis*, (1883) 24 Ch. D. p. 338.

(*h*) Fourteen in the case of boys, sixteen in that of girls.

(*i*) Whatever the age of the child, there is no power in a Court or Judge to order the issue of a writ of *habeas corpus* directed to a person who at the date of the order is out of the jurisdiction (*Rex* v. *Pinckney* (1904) 2 K. B. 84, C. A.).

suggested that an action of false imprisonment would not lie against a father who forcibly stopped his daughter aged sixteen from eloping to Gretna Green (*a*). And it is apprehended that if the child leaves the father's house against his will he may, unless the Court interferes to restrain him from so doing (*b*), resort if necessary to the use of force for the purpose of regaining possession of the child, just as he may in the case of the reception of chattels (*c*). In *Reg.* v. *Jackson* (*d*), where it was held that a husband could not forcibly retake possession of his wife's person for the purpose of enforcing his right of *consortium*, the Court were careful to distinguish the case from that of a father retaking possession of his child under age (*e*). The apparent effect of the Custody of Children Act, 1891, is however to give an unlimited discretionary power to the Court in all matters relating to the custody of children under the age of twenty-one years (*f*).

It is also provided by s. 6 of the Prevention of Cruelty to Children Act, 1904 (*g*), that where a person having the legal charge of a child (under the age of sixteen years) is convicted of an offence against the Act, the Court adjudicating on the offence may, in its discretion, make an order as to the future custody of the child.

While a child remains in the custody of the father the latter may beat or imprison the former either to punish past or, it may be, restrain threatened misconduct (*h*). The force used must be reasonable in itself. Anything outrageous or cruel on a father's part clearly is an assault. But it is submitted that if a father

(*a*) *Per* Bowen, L.J., *In re Agar Ellis*, (1883) 24 Ch. D. p. 321; *per* Parke, J., *Barker* v. *Taylor*, (1823) 1 C. & P. 101. The *dicta* of Lord Esher, M.R., and Smith, L.J., in *Reg.* v. *Gyngall*, (1893) 2 Q. B. pp. 245, 253, as to a girl over sixteen being emancipated and having a right to act on her own views as to where she should reside are opposed to earlier authority. In *Todd* v. *Lynes* (Times, 26 July, 1873), Malins, V.-C., ordered a boy of seventeen, against his wish, to be delivered up to his father.

(*b*) Which the Court will do if for the benefit of the child (*In re Esther Lyons*, (1869) 22 L. T. N. S. 770).

(*c*) See above, p. 152. It may be that if the father made his house a place unfit for a virtuous girl to live in, the daughter might lawfully leave it, and that if he attempted to retake her for the purpose of bringing her back there he would be guilty of false imprisonment.

(*d*) (1891) 1 Q. B. 671.

(*e*) *Ibid*, pp. 681, 685.

(*f*) 54 & 55 Vict. c. 3.

(*g*) 4 Edw. VII. c. 15; see also 2 Edw. VII. c. 28, s. 5 (ss. 2 (6), The Licensing Act, 1902).

(*h*) 1 Bl. Com. 452.

acts in good faith and believes in the existence of a state of facts which would justify the use of force, he is not to be held guilty of an assault because his belief is unreasonable. However great the misconduct of the father, even though it be such that if brought before the Court it would cause him to be deprived of his paternal custody, it does not, it is apprehended, operate to invalidate his general authority so long as the custody in fact endures. But the authority exists only for the benefit of the child, and the maintenance of domestic discipline. A father must not punish arbitrarily, nor for disobedience to unlawful commands. If he orders his son to commit a crime, and beats him because he refuses, this is clearly an assault. Guardians, other than the father, are practically those appointed by the Court or by will (12 Car. II. c. 24, s. 8), or the surviving mother (under 49 & 50 Vict. c. 27). Generally as to the law relating to the custody, education and maintenance of infants, see Macqueen's Law of Husband and Wife, 4th ed. (1905), pp. 423 *sqq*. As to illegitimate children see Simpson on Infants, 2nd ed., p. 136. A child with no guardian may, it seems, elect one for himself (*ibid.* p. 212). A person who undertakes the care and nurture of a child though without legal right would be entitled, it is apprehended, to chastise the child while the custody in fact continued. Usually where a person stands to a child *in loco parentis* he does so by virtue of delegation of authority by the parent, but it seems that such delegation is not essential to the establishment of that relation.

Authority of schoolmaster.

"The authority of a schoolmaster is, while it exists, the same as that of a parent. A parent, when he leaves his child with a schoolmaster, delegates to him all his own authority, so far as is necessary for the welfare of the child" (*a*). The authority of a master over his apprentice stands on the same footing (*b*). The only difference is that a child can be compelled to go to school, but by the common law no one can be bound apprentice without his own consent (*c*). A father, it is suggested above, is not liable to an action for the chastisement of an unoffending child so long

(*a*) *Per* Cockburn, C.J., *Fitzgerald* v. *Northcote*, (1865) 4 F. & F. p. 689; see *Reg.* v. *Hopley*, (1860) 2 F. & F. 202.

(*b*) *Penn* v. *Ward* (1835) 2 C. M. & R. 338.

(*c*) *R.* v. *Arnesby*, (1820) 3 B. & Ald. 584.

as he acts in good faith, but a schoolmaster, it would seem, can never be justified unless he acts with reasonable and probable cause (*a*). A man who takes on himself such an office may fairly be required to show prudence and judgment in the exercise of discipline. The authority of a schoolmaster is not strictly limited to the time during which the pupil is under his actual care. If the pupil on his way to or from school act in a manner detrimental to scholastic discipline, the master may punish him (*b*).

Master of ship.

The master of a vessel on the high seas or in a foreign port (*c*) may be considered as standing in the position of the head of a family (*d*), and has disciplinary powers not only over the crew but the passengers also (*e*). The power is "based upon necessity and is limited to the preservation of necessary discipline and the safety of the ship" (*f*). It is obvious that the master of a vessel at sea may frequently be compelled to act in a very decisive and severe manner, if he is to maintain discipline and carry out his voyage, and therefore a licence will be accorded to him which would not be tolerated in the case of a parent or master.

(*a*) *Fitzgerald* v. *Northcote*, (1865) 4 F. & F. 656.

(*b*) *Cleary* v. *Booth*, (1893) 1 Q. B. 465. But the master of a public elementary school may not without the consent of the parent set a child lessons to be done out of school, and punish for failure to learn such lessons (*Hunter* v. *Johnson*, (1884) 13 Q. B. D. 225).

(*c*) *Lamb* v. *Burnett*, (1831) 1 C. & J. 291.

(*d*) *Per* Tindal, C.J., *Murray* v. *Moutrie*, (1834) 6 C. & P. p. 473.

(*e*) *Aldworth* v. *Stewart*, (1866) 4 F. & F. 957. In the case of emigrant ships these are defined by ss. 324, 325, of the Merchant Shipping Act, 1894.

(*f*) *Per* Channell, B., *Aldworth* v. *Stewart*, *supra*, at p. 961.

CHAPTER X.

SEDUCTION AND LOSS OF SERVICE.

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Right to service a species of property.

WHERE the relation of master and servant exists the right which the one has to the service of the other is regarded by the law as a species of property or interest, a wrongful infringement of which causing actual damage is a good cause of action (*a*). It has been already pointed out that an action lies for *maliciously* procuring a breach of contract, whether the contract be of service or otherwise (*b*). This remedy is merely a particular application of the general principle that each man shall be answerable for the damage which he intentionally causes to his neighbour without any legal excuse or justification, but has only of late years been fully recognised in the English law (*c*).

Historical origin of action for loss of service.

Actions for loss of service, on the other hand, are of great antiquity, and had their origin in a state of society when service as a rule was a matter not of contract but of status (*d*). At common law if A. *took* the servant of B., he took what originally at any rate was regarded as the chattel of B., and thereby he committed a trespass. So if a servant was beaten this was a trespass on the property of the master. It was early settled, however, that such a trespass was not actionable *per se*, but that it was necessary to allege, with a *per quod*, actual damage by reason of the loss of service (*e*). The action, therefore, though founded on a notion of trespass, was in substance for the consequential damage, and there was considerable fluctuation of opinion as to its proper

(*a*) *Per Cur. Grinnell* v. *Wells*, (1844) 7 M. & G. p. 1041.

(*b*) See above, pp. 17 and 24, 25.

(*c*) In *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333. As to the further extension in *Flood* v. *Jackson*, (1895) 2 Q. B. 21, see above, p. 25.

(*d*) Year Book, 11 Hen. IV. fol. 2, M. 22; Hen. VI. fol. 30.

(*e*) *Robert Marys's case*, (1612) 9 Rep. p. 113 a.

form (*a*). It was, however, finally settled that the plaintiff might declare either in trespass or case (*b*).

If a female servant was debauched and carnally known and through a consequent illness her master was deprived of her service, the carnal knowledge being a physical act committed against the will of the master was considered a trespass, and so alleged in the old form of pleading (*c*).

If the injury to the servant is produced not by a trespass but by an act of negligence, the master has nevertheless a right of action for loss of service (*d*).

Statute of Labourers.

By the first Statute of Labourers it was made a criminal offence for a servant to leave his service before the end of his term, or for any party to receive and keep a servant who had so left (*e*). Subsequently to the passing of this Act the Courts began to entertain actions founded on the breach of duty thereby created both for knowingly enticing servants away from their employment and for knowingly harbouring servants who had previously left their employment (*f*). The statute was repealed by 5 Eliz. c. 4, but the class of actions which had originated under it had by this time become inveterate.

No action for enticing servant where he breaks no contract.

It will be observed that the words of the statute are directed against dealings with servants "*ante finem termini concordati*" (before the end of the term agreed), and this seems to show the action lies only where there is a breach of contract. If the servant does no wrong in leaving his employment neither does the person who instigates him. Therefore if a man has contracted to serve for a definite period, it is lawful to induce him to leave at the conclusion of such period, even though otherwise

(*a*) *Macfadzen* v. *Olivant*, (1805) 6 East, 387.

(*b*) *Ditcham* v. *Bond*, (1814) 2 M. & S. 436; *Chamberlain* v. *Hazlewood*, (1839) 5 M. & W. 515. It is to be noticed that the question of form of action may still be important with reference to the period of limitation.

(*c*) See *Edmondson* v. *Machell*, (1787) 2 T. R. 4.

(*d*) *Martinez* v. *Gerber*, (1841) 3 M. & G. 88.

(*e*) 23 Edw. III. The second chapter of the statute is as follows: "If any reaper, mower, or other workman or servant, of what estate or condition he be, retained in any man's service, do depart from the said service without reasonable cause or licence before the term agreed, he shall have pain of imprisonment; and that none under the same pain presume to receive or to retain any such in his service."

(*f*) See the argument of Coleridge, J., on this point in *Lumley* v. *Gye*, (1853) 2 E. & B. pp. 253 *sqq*., which is approved in *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333.

he would in fact have continued in the old service (*a*). So it is lawful to procure a piece-worker to leave his employ as soon as the work in hand is finished (*b*). However, in *Keene* v. *Boycott* (*c*), the servant in question was an infant and employed under a voidable contract with the plaintiff. He did avoid this contract and left his service at the inducement of the defendant, and it was held that there was a good cause of action. But this case seems contrary to principle and may be taken to be overruled by the decision of the Court of Appeal in *De Francesco* v. *Barnum* (*d*). The defendant there had enticed away an apprentice of the plaintiff. But the indenture contained unreasonable stipulations, and it was held that it might be avoided by the apprentice, and that it was not unlawful for the defendant to persuade the apprentice to do that which was lawful. It is different however if malice (*e*), force, or fraud be used to take or decoy the servant away. In that case the master has a right of action, even though the servant be under no binding obligation (*f*).

And *à fortiori* it is unlawful for persons to combine together to induce a breach of contract of service in others (*g*).

When service determined no action for harbouring servant.

It is at any rate clear that if a service is once lawfully determined no action can lie against any one who receives or harbours the servant. In *Forbes* v. *Cochrane* (*h*) the defendant sheltered on board of a British man-of-war certain slaves who had escaped from the service of the plaintiff in Florida, and it was held though the enticing of the slaves would have been actionable, since according to the law of Florida their servitude was lawful, yet that such servitude ceased directly they came under the British flag and consequently that they might lawfully be harboured.

Harbouring with knowledge.

So long as the obligation of the servant to his first master continues, there lies on all other people who know that fact a duty not to aid and abet such servant in breach of his contract of

(*a*) *Per* Lord Kenyon, *Nichol* v. *Martyn*, (1799) 2 Esp. p. 734.

(*b*) *Hart* v. *Aldridge*, (1774) 1 Cowp. 54; but see *Anon.*, (1774) Lofft, 493.

(*c*) (1795) 2 H. Bl. 511.

(*d*) (1890) 45 Ch. D. 430.

(*e*) *Leathem* v. *Craig*, (1899) 2 Ir. R. 667, C. A.; *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333, C. A.

(*f*) *Per* Willes, J., *Evans* v. *Walton*, (1867) L. R. 2 C. P. pp. 621–2.

(*g*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, 1905) A. C. 239.

(*h*) (1824) 2 B. & C. 448.

service. Therefore if a person ignorantly takes into his employment one who ought to be serving elsewhere, he is bound on becoming aware of the breach of contract to dismiss him, otherwise he becomes liable to an action for harbouring with knowledge (*a*).

Motive material.

The old forms of pleading in actions for enticing away or harbouring servants, besides alleging knowledge of the service, always alleged that the defendant did the act complained of, "contriving and intending to injure the plaintiff." Whether the latter averment was regarded as material and traversable was not very clear. No doubt in the majority of cases the fact of knowledge is practically conclusive of malice. But there may be cases in which the defendant *bonâ fide*, in the servant's own interest, advises him to break his contract. It was at one time thought that in such cases action would not lie, but in view of the decision of the House of Lords in the case of the *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, this presumption is no longer tenable (*b*). Nor is it in all cases essential that the defendant should have been actuated by a desire either to injure the plaintiff or to benefit himself at the plaintiff's expense (*c*). The old theory that the whole gist of the right of action lies in the malicious intent, and that only where this is made out to the satisfaction of the Court is the aggrieved party entitled to damages against the defendant (*d*), in the light of recent decisions, being no longer a correct exposition of the law.

Wrongful act causing death of servant,

It was held in *Osborn* v. *Gillet* (*e*), that a master could not recover damages for a loss of service caused by a wrongful act which resulted in the immediate death of the servant. And the maxim *actio personalis moritur cum personâ* was held to apply. From the judgment, however, Bramwell, B., dissented, and certainly his reasoning appears to be far more satisfactory than that of the majority of the Court.

Wrongful act also a breach of contract with servant.

The case of *Alton* v. *Midland R. Co.* (*f*) was long supposed to

(*a*) *Blake* v. *Lanyon*, (1795) 6 T. R. 221; see *Foster* v. *Stewart*, (1814) 3 M. & S. 192.

(*b*) (1905) A. C. 239.

(*c*) *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333.

(*d*) *Temperton* v. *Russell*, (1893) 1 Q. B. 715, C. A.; *Leathem* v. *Craig*, (1899) 2 Ir. R. 667.

(*e*) (1873) L. R. 8 Ex. 88.

(*f*) (1865) 19 C. B. N. S. 213.

decide that where a servant was injured by an act of the defendant which was a breach of contract with the servant the master could not recover for loss of service. It has recently however been explained that this case simply turned on a point of pleading (*a*).

The rule is that if a servant is injured by positive misfeasance the master has his right of action none the less because the misfeasance is also a breach of contract, but if the servant has no remedy except by alleging a breach of contract, then the master has no right of action. A master cannot recover against a carrier who delays a servant on his journey, but it is otherwise if the carrier breaks the servant's leg.

Action for loss of service of child.

Under the colour of an action for the loss of services a father may obtain redress for injury to his domestic or paternal right if his child is beaten or injured or taken or kept from his custody or control, and especially if his daughter is debauched and thereby rendered ill (*b*). A person who has accepted the responsibility and duty of a father stands on the same footing (*c*).

Loss of service must be technically proved.

Although the allegation of loss of service in actions of this nature is in general a mere fiction, yet it is still one which it is necessary technically to prove. The plaintiff therefore cannot recover where the child in respect of whom the alleged injury has arisen is of such tender years as to be incapable of any act of service (*d*).

Seduction of daughter.

It is, however, in cases where the wrongful act consists in the debauching of a daughter, or a person owing the duty of a daughter, that the difference between form and substance operates most frequently to cause difficulty and work injustice.

Seduction must cause illness.

The plaintiff must prove an act of carnal intercourse and a consequent disablement of the daughter from service, either by her confinement or otherwise. If she has been intimate with more men than one and afterwards has a child, the only person liable is the man to whom the paternity is attributable (*e*). It must

Service at time of seduction and time of illness.

(*a*) *Per* A. L. Smith, L.J., *Taylor* v. *M. S. & L. R. Co.*, (1895) 1 Q. B. p. 140 ; *per* Esher, M.R., and A. L. Smith, L.J., *Meux* v. *Great Eastern R. Co.*, (1895) 2 Q. B. p. 391 and p. 394. See also *Berringer* v. *Great Eastern R. Co.*, (1879) 4 C. P. D. 163.

(*b*) *Jones* v. *Brown*, (1794) Peake, 233 ; *Berringer* v. *Great Eastern R. Co.*, *supra* ; *Evans* v. *Walton*, (1867) L. R. 2 C. P. 615.

(*c*) *Irwin* v. *Dearman*, (1809) 11 East, 23.

(*d*) *Hall* v. *Hollander*, (1825) 4 B. & C. 660.

(*e*) *Eager* v. *Grimwood*, (1847) 1 Ex.

further appear that there was a service both at the time of the original wrongful act and at the time of the subsequently accruing injury. If there is no service at the former date the whole foundation of the action fails; there is no relation between the plaintiff and the defendant, and no right of the former is infringed. Although there be a subsequent service which is interrupted in consequence of what has previously happened this is no cause of action, for the master takes the risk of the condition of the servant at the time of the commencement of the employment (*a*). If there is no service at the latter date there is no damage sustained, for the gist of the action is not the debauching itself, nor any other consequential damage except the loss of service (*b*).

Right of service when daughter under age.

A father, or a person in the position of a father, can establish a *primâ facie* case by showing that the girl in question is under the age of twenty-one and unmarried (*c*). In such circumstances he has a right to her service, and this he does not lose unless he voluntarily parts with it by permitting her to transfer her filial duty to another person, or to enter into some other service which is inconsistent with service to himself (*d*). It follows that if the girl has been in service away from home and the engagement terminates, the right of the father at once revives, and she is considered as being in his service even before she is restored to her home (*e*). On the other hand, if the young woman is over age some proof of actual service is necessary, but the service need not be rendered under any legal obligation (*f*). A daughter cannot as a rule be said to be in her father's service if she lives

Where over age must be some actual service.

61. In *Boyle* v. *Brandon*, (1845) 13 M. & W. 738, the question was raised whether an action would lie where the illness was caused not by the seduction, but the subsequent desertion of the daughter by the defendant. But the damage would seem to be very remote. See *Allsop* v. *Allsop*, (1860) 5 H. & N. 534.

(*a*) *Davies* v. *Williams*, (1847) 10 Q. B. 725.

(*b*) *Grinnel* v. *Wells*, (1844) 7 M. & G. 1033; *Harris* v. *Butler*, (1837) 2 M. & W. 539; *Eager* v. *Grimwood*, *supra*.

(*c*) Formerly the action of seduction was held not to be maintainable without proof that the relationship of master and servant existed, and in all cases some service was held necessary. The rule was afterwards so far relaxed that if the child was a minor and unmarried and not in the service of any one else, the service to her father was presumed.

(*d*) *Dean* v. *Peel*, (1804) 5 East, 45; *Blaymire* v. *Haley*, (1840) 6 M. & W. 55; *Whitbourne* v. *Williams*, (1901) 2 K. B. 722.

(*e*) *Terry* v. *Hutchinson*, (1868) L. R. 3 Q. B. 599.

(*f*) *Bennett* v. *Allcott*, (1787) 2 T. R. 166.

independently, even though she contribute to his support or otherwise perform acts of filial duty (*a*). It is not necessary that she should be actually living under his roof. Where a father occupied two farms and resided at one while the daughter looked after the domestic affairs of the other, it was held that there was good proof of service (*b*). In a modern Irish case (*c*), the plaintiff's daughter was *sui juris* and maintained herself independently in lodgings, having an engagement during the day-time. In her leisure hours she was accustomed to assist her mother in her household affairs. The seduction took place under her father's roof, and it was held by a majority of the Court that there was sufficient evidence of service to support the action. No English authority has gone to the extent of this case.

Married daughter.

If a married daughter lives apart from her husband with her father and does acts of service the father may have a cause of action for her seduction (*d*).

Service how proved.

Any participation in household affairs or the performance of trivial domestic duties will afford sufficient evidence of service. "Making tea has been held to be an act of service" (*e*).

Termination of service fraudulently procured.

In *Speight* v. *Oliviera* (*f*) the defendant under pretence of providing a place for the plaintiff's daughter, who was twenty-three years old, caused her to leave home and debauched her. She subsequently returned to the plaintiff and had a child. Abbott, C.J., held that as there had been no real engagement of service with the defendant the relation of master and servant originally existing between the father and the daughter had continued unchanged throughout. This decision would clearly have been right had the daughter been under age. It would seem, however, that the fact of her being *sui juris* made a substantial distinction. It was not necessary in order that the father should lose his right that she should form another valid contract; it

(*a*) *Manley* v. *Field*, (1859) 7 C. B. N. S. 96.

(*b*) *Holloway* v. *Abell*, (1836) 7 C. & P. 528.

(*c*) *O'Reilly* v. *Glavey*, (1892) 32 L. R. Ir. 316. The actual decision may be justified on the ground mentioned below, p. 226.

(*d*) *Harper* v. *Luftkin*, (1827) 7 B. & C. 387.

(*e*) *Per* Abbott, C.J., *Carr* v. *Clarke*, (1818) 2 Chit. p. 261; *Bennett* v. *Allcott*, (1787) 2 T. R. 166.

(*f*) (1819) 2 Stark. 493. It would have been different if the action had been for decoying away and not for debauching. See *Evans* v. *Walton*, 1867) L. R. 2 C. P. 615.

was sufficient that she should in fact cease to serve him, which was the case. There was neither a right of service nor an actual service.

Continuance of service in temporary absence.

If actual service or a right of service is shown, the relationship continues though the servant be temporarily absent on a visit without entering any fresh service (*a*). In *Griffiths* v. *Teetgen* (*b*) the defendant had requested the plaintiff to allow his daughter temporarily to look after the defendant's shop, his wife being absent, and it was agreed that some payment should be made for her assistance. The defendant seduced the daughter while resident with him, and she returned home and was there confined. It was held that the plaintiff had a good cause of action, as the daughter must be considered the visitor rather than the servant of the defendant.

Conversely if the daughter goes regularly into service away from home, but is permitted to return on a visit, she will not during the time of such visit become her father's servant though she do acts of service to him (*c*).

If a daughter resides at home but goes out to work during the day, such service is not inconsistent with the relationship of master and servant existing between herself and her father; and the Court will not be curious to enquire whether she was debauched while abroad or while at home (*d*).

Although in an action of seduction the plaintiff must allege and prove loss of service, yet it would seem that in some cases damage may be obtained for a seduction without loss of service. If the seduction takes place under the father's roof, the circumstances being such as to negative a licence express or implied for the seducer being there, or such as to make him a trespasser *ab initio*, the father, according to Lord Holt's opinion (*e*), may bring his action of trespass for breaking and entering the house and lay the seduction as matter of aggravation. "No action lies for the

(*a*) See *Edmondson* v. *Machell*, (1787) 2 T. R. 4.

(*b*) (1854) 15 C. B. 344.

(*c*) *Thompson* v. *Ross*, (1860) 5 H. & N. 16; *Hedges* v. *Tagg*, (1872) L. R. 7 Ex. 283; *Whitbourne* v. *Williams*, (1901) 2 K. B. 722.

(*d*) *Ogden* v. *Lancashire*, (1866) 15 W. R. 158; *Rist* v. *Faux*, (1863) 4 B. & S. 409.

(*e*) *Per* Holt, C.J., *Russell* v. *Corn*, (1703) 6 Mod. 127, cited by Buller, J., in *Bennett* v. *Allcott*, (1787) 2 T. R. p. 167.

master for the battery of his servant without a *per quod*, yet it may well be put in as matter of aggravation. Suppose a man get another's maid or daughter with child, no trespass lies for it. Yet if he that has done it comes into the house without the owner's leave, he may put the getting his daughter with child for aggravation." The right of action for seduction does not however pass to a master's assignees on his bankruptcy (*a*); nor does it survive the death of the parent on whose loss of service, had he lived to the birth of the child, it might have been founded.

Thus in the Irish case of *Hamilton* v. *Long* (*b*) (where a daughter, debauched two months before the death of her father, continued residing with, and performing acts of service for, her mother up to the date of her confinement) it was held that neither at common law nor under the Married Women's Property Acts could the mother maintain an action for the seduction of her daughter.

Action by husband for loss of wife's service.

Action of crim. con. abolished.

A husband has a right to the society and service of his wife just as a father has to the service of his daughter, and for injury to this right the law gives analogous remedies (*c*). The old action for criminal conversation was an action for loss of service, and could not be maintained where the husband had entirely abandoned his right to the society of the wife (*d*). This action no longer exists at common law, but by 20 & 21 Vict. c. 85, s. 33, a husband may present a petition in the Divorce Court solely for damages on the ground of the respondent's adultery with the petitioner's wife, and such petition is to be decided on the same footing as the old action for criminal conversation subject to this, that if a husband cannot succeed in a petition for divorce he cannot succeed in a claim for damages. If there has been condonation no damages can be recovered, which was not the case at common law (*e*). But where damages are recoverable the

(*a*) *Howard* v. *Crowther*, (1841) 8 M. & W. 601.

(*b*) *Hamilton* v. *Long*, (1903) Ir. R. 2 K. B. 407.

(*c*) *Smith* v. *Kaye and Another*, (1904) 20 T. L. R. 261.

(*d*) *Weedon* v. *Timbrell*, (1793) 5 T. R. 357.

(*e*) *Bernstein* v. *Bernstein*, (1893) P. 292. But in *Izard* v. *Izard*, (1889) 14 P. D. 45, it was held that a husband living apart from his wife under a separation deed might recover damages.

measure of such damages is not to be assessed solely upon the basis of loss of society, although one main ground is the breaking up of the household (*a*). The remedy, however, is still at common law if a wife is merely induced to leave her husband, or if, after having left she is harboured and maintained (*b*). It is, of course, a defence to such action if the husband have so misconducted himself that the wife is justified in quitting him, and it would seem that it is also a defence if it be honestly believed that such a state of facts exists (*c*).

Action for enticing away and harbouring wife.

A husband may sue apart from his wife for personal injuries done to her by trespass or negligence, in consequence of which she is rendered less able to discharge her domestic duties or otherwise to render assistance to him in his affairs (*d*).

Action for personal injuries to wife.

It would seem to be an open question whether under any circumstances a wife can have a right of action for deprivation of her husband's society. In *Lynch* v. *Knight* (*e*) the majority of the law lords expressed an opinion in favour of such an action being maintainable, although they decided against the plaintiff on the ground that the alleged consequential injury was not sufficiently connected with the alleged wrongful act. Lord Wensleydale, on the other hand, expressly held that no such action would lie. The right of the wife, if any, must stand on a footing very different from the right of the husband, for the latter has a right of control and a claim of service which the former has not. It has never been held or suggested that a wife can sue by reason of an injury to her husband which prevents him from maintaining her as well as he might otherwise have done, although in case of his death she may have a remedy under 9 & 10 Vict. c. 93; or under the provisions of the Workmen's Compensation Act, 1897 (*f*).

Right of wife to sue for loss of *consortium* of husband.

(*a*) *Evans* v. *Evans*, (1899) P. 195.

(*b*) *Winsmore* v. *Greenbank*, (1745) Willes, 577. This cause of action seems to be untouched by the decision in *Reg.* v. *Jackson*, (1891) 1 Q. B. 671. It is apprehended that the husband in that case, though he could not compel the wife to live with him, would have had a good cause of action against her relations who harboured her and persuaded her not to return to him. See above, p. 5.

(*c*) *Berthon* v. *Cartwright*, (1796) 2 Esp. 480; *Philp* v. *Squire*, (1791) Peake, 114.

(*d*) *Brockbank* v. *Whitehaven Junction R. Co.*, (1862) 7 H. & N. 834.

(*e*) (1861) 9 H. L. C. 577.

(*f*) 60 & 61 Vict. c. 37.

Damages in case of ordinary servant.

In the case of an ordinary servant the master may recover not merely the actual damage sustained up to the time of action brought, but also in respect of the future service which he is likely to lose (*a*). It would seem, however that he ought to be limited to the period for which he has a binding contract of service. Any further damage founded on a speculation that the service would continue beyond the agreed time would be too remote. If, however, the action is based on the malice of the defendant, there is no such limitation, and if the justice of the case requires it, exemplary damages may be given. In *Gunter* v. *Astor* (*b*) the plaintiff's workmen were employed simply by the piece. The defendant induced them all to quit suddenly, leaving their work unfinished, and the business of the plaintiff was thereby ruined. He recovered 800*l*. damages, being the amount of two years' profits, and it was held not to be an excessive sum (*c*).

Damages aggravated by malice.

In an ordinary case, however, the damages for procuring a breach of contract will not exceed those which might be recoverable for the breach of the contract itself (*d*).

Damages for injury to feelings.

Where the plaintiff stands in a parental or quasi-parental relation to the person the loss of whose service he alleges, he can generally recover for the injury to his feelings as well as for the actual loss sustained. This is not, however, so in every case, as for instance, where the defendant has simply been guilty of an act of negligence without any intentional wrong-doing (*e*) towards the plaintiff. It is, however, customary to allow the plaintiff to recover any expense for nursing, attendance, and the like to which he may have been put, although it would not of itself apart from loss of service be an actionable damage (*f*).

Damages in action of seduction.

When the action is for debauching a female servant the injury to the plaintiff's feelings is always a matter of aggravation, whether he occupy a parental relation or not (*g*). In this

(*a*) *Hodsoll* v. *Stallebrass*, (1840) 11 A. & E. 301.

(*b*) (1819) 4 Moore, 12.

(*c*) See too *per* Crompton, J., *Lumley* v. *Gye*, (1853) 2 E. & B. p. 230; *Bixby* v. *Dunlap*, (1876) 22 Amer. Rep. 475.

(*d*) *Bird* v. *Randall*, (1762) 3 Burr. 1346; *Quinn* v. *Leathem*, (1901) A. C. 495.

(*e*) *Flemington* v. *Smithers*, (1826) 2 C. & P. 292.

(*f*) *Flemington* v. *Smithers*, *supra*; *Dixon* v. *Bell*, (1816) 1 Stark. 287.

(*g*) *Howard* v. *Crowther*, (1841) 8 M. & W. 601.

kind of action the whole conduct of the parties and their position in life, though not their means, are to be taken into consideration (*a*). It is an aggravation of the damage if the defendant did the wrong while received as an honourable suitor (*b*): on the other hand, it is a mitigation if the plaintiff has himself been a negligent and imprudent guardian (*c*). The defendant may further seek to reduce the damages by proving the woman to be of bad reputation, but he cannot give in evidence specific acts of misconduct on her part (*d*) except with a view of attributing the paternity of her child to some one else, in which case the evidence is admissible not on the question of damages but as a defence to the action (*e*). Evidence of the woman's good character cannot be given in the first place, but only after the question has been raised by the defendant (*f*). Lord Ellenborough decided in two cases that the mere fact that she had been cross-examined as to her character did not put it in issue (*g*), but must be taken simply as an impeachment of her credit; on the other hand, in a later case, after such cross-examination evidence of good character was held admissible (*h*).

(*a*) *Hodsoll* v. *Taylor*, (1873) L. R. 9 Q. B. 79.

(*b*) *Elliot* v. *Nicklin*, (1818) 5 Price, 641; *Berry* v. *Da Costa*, (1866) L. R. 1 C. P. 331.

(*c*) In *Reddie* v. *Scoult*, (1795) Peake, 316, the plaintiff had suffered the defendant, whom he knew to be married, to court his daughter on the representation that he was about to procure a divorce, and Lord Kenyon directed a nonsuit. It would seem, however, that nothing short of absolute connivance would deprive the plaintiff of all right of action. See *Duberley* v. *Gunning*, (1791) 4 T. R. 651.

(*d*) *Scott* v. *Sampson*, (1882) 8 Q. B. D. 491.

(*e*) *Foulkes* v. *Selway*, (1800) 3 Esp. 236; *Jones* v. *James*, (1868) 18 L. T. N. S. 243.

(*f*) *Garbutt* v. *Simpson*, (1863) 32 L. J. M. C. 186.

(*g*) *Bamfield* v. *Massey*, (1808) 1 Camp. 460; *Dodd* v. *Norris*, (1814) 3 Camp. 519.

(*h*) *Bate* v. *Hill*, (1823) 1 C. & P. 100.

CHAPTER XI.

TRESPASS TO CHATTELS AND CONVERSION.

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Injuries to chattels.

In dealing with rights of action arising out of injuries done to property movable and tangible in its nature, there are two main things to be considered: first of all, the nature of the wrongful act; secondly, the nature of the right or interest which is infringed by such act. It is clear that he who actually damages a chattel belonging to another, whether indirectly by reason of his negligence, or directly by some act done to the chattel in the nature of a trespass, is guilty of a wrong. Where a cab-driver had deposited his licence with his employer and the latter on discharging him from his service indorsed his reasons for so doing on the licence without any authority, it was held that there was a good cause of action, and that it was no defence to plead the truth of the indorsement (*a*).

Physical damage.

Asportation.

There may be a trespass without the infliction of any material damage by a mere taking or asportation. The removal of a chattel from one room to the other without any authority, express or implied from the circumstances (*b*), may be a good cause of action, although but for nominal damages (*c*). It is

(*a*) *Rogers* v. *Macnamara*, (1853) 14 C. B. 27; see *Hurrell* v. *Ellis*, (1845) 2 C. B. 295; *Wennhak* v. *Morgan*, (1888) 20 Q. B. D. 635; *Norris* v. *Birch*, (1895) 1 Q. B. 639.

(*b*) As where property derelict or endangered is taken with the intention of preserving it for the owner, see *per* Coke, C.J., *Isaack* v. *Clarke*, (1613) 2 Buls. p. 312; *per* Pollock, C.B.; *Reg.* v. *Riley*, (1853) Dears, C. C. p. 157; *Kirk* v. *Gregory*, (1876) 1 Ex. D. 55.

(*c*) *Kirk* v. *Gregory*, *supra*.

When asportation no trespass.

apprehended, however, that for a taking to constitute a trespass it must not merely be an unlawful act but unlawful as against the party from whom possession is taken. Thus, if goods belong to A., and B. being unlawfully possessed of them transfers them to C., the taking of them by C., though it may give a good cause of action in trover, is not a trespass (*a*). And it makes no difference, it would seem, if C. is aware of the infirmity of B.'s title. The receiver of stolen goods does not commit a trespass when he takes the goods from the thief with the thief's consent. If it were otherwise every receiver might be indicted for larceny.

Formerly if a sheriff seized goods under an execution and it turned out ultimately that the execution debtor had previously committed an act of bankruptcy, and that consequently his assignees in bankruptcy acquired a title by relation to the goods seized in the execution, they might sue the sheriff in trover for the value of the goods, but they could not treat him as a trespasser, because his act was not wrongful as against the debtor from whose possession the goods were taken. But it was different where the original taking was, in every sense, unauthorised, for in such case mere title by relation would enable the party possessing it to maintain an action of trespass. Thus an administrator may sue for an illegal distress made between the death of his intestate and the grant of letters of administration (*b*).

Taking without change of possession.

There may sometimes be an unlawful taking of a chattel although the trespasser has it in his physical custody and control. Formerly (*c*), a bailee could not be indicted for larceny merely because he dishonestly converted to his own use the subject-matter of a bailment. He did not interfere with the possession, and there was consequently no trespass and no larceny. But if he "broke bulk," that is to say, abstracted from the bale, barrel, or parcel, as the case might be, a portion of its contents, he committed a trespass and was indictable for larceny.

Conversion.

The most important class of cases to consider is that in which the person entitled to the possession of a chattel is permanently

(*a*) See *Mennie* v. *Blake*, (1856) 6 E. & B. 842: *Winter* v. *Bancks*, (1901) 84 L. T. 504.

(*b*) *Tharpe* v. *Stallwood*, (1843) 5 M. & G. 760; explaining *Balme* v. *Hutton*, (1833) 9 Bing. 471.

(*c*) Larceny by a bailee was first made an offence by 20 & 21 Vict. c. 54, s. 4, re-enacted by 24 & 25 Vict. c. 96, s. 3,

deprived of that possession, and the chattel is *converted* to the use of some one else. Here the wrong is not done to the thing itself but to the abstract right in the thing.

It may of course happen that the one wrong will involve the other. If A. takes the chattel of B. from him he commits an act of trespass, if he takes it and keeps it he is guilty of both trespass and conversion (*a*). A man may, however, be deprived of his property by many other means than a wrongful taking, as for instance, by a wrongful detention.

Remedies for deprivation of possession.

Apart from trespass, there were at common law three forms of remedy open to the person who had been tortiously deprived of his goods. He might proceed by trover, detinue or replevin.

Trover and conversion.

The action of trover, according to the original form of declaration, was applicable only to cases where the plaintiff had lost his goods and they were subsequently found and appropriated by the defendant. However, the averments of loss and finding had long been considered immaterial, and were not traversable by the defendant.

Lord Mansfield thus describes the action of trover: "In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully into the possession of the goods. The action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten" (*b*). It will be seen afterwards, however, that the mere unlawful taking may of itself be a good cause of action in trover. By the first Common Law Procedure Act (*c*) the fictitious averments were abolished, and by the form of declaration given it was simply alleged that "the defendant converted to his own use *or* wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods" (*d*). These alternative allegations are in truth

(*a*) See below, pp. 234, 235, *Foulder* v. *Willoughby*, (1841) 8 M. & W. 540.

(*b*) *Cooper* v. *Chitty*, (1756) 1 Burr. p. 31.

(*c*) 15 & 16 Vict. c. 76, s. 49.

(*d*) It is said that this alternative allegation was in reality intended as a substitute for the first, and that the two

exactly equivalent to one another, and it is the latter that most correctly describes the nature of the action, since the plaintiff sues in respect of the loss of goods which he has suffered, irrespective of any particular appropriation of them which may have been made by the defendant (*a*). The word conversion, however, is the recognised legal expression for the wrongful deprivation of the possession of goods, and its use in this artificial and fictitious sense has now probably become inveterate (*b*).

An act of conversion may be committed, (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed.

Conversion by taking.

1. Any one who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *primâ facie* guilty of a conversion. It has, however, been said that a person who seeks to acquire some property in a chattel not being aware of the title of the true owner is not guilty of a conversion by the mere fact of taking possession. This question is discussed later on (*c*).

Intention to exercise dominion.

A mere taking unaccompanied by an intention to exercise permanent or temporary dominion may be a trespass, but is no conversion. In *Fouldes* v. *Willoughby* (*d*) the plaintiff had embarked in the defendant's ferry-boat two horses, and had paid for their passage. Subsequently the latter without justification refused to carry out his contract and desired the plaintiff to remove the horses from the boat, which the plaintiff refused to do. The defendant then took them from the plaintiff and turned them loose on the landing-place. At the trial the jury were directed that by so doing he was guilty of a conversion. It was held that this was a misdirection, because the jury ought to have been asked to consider what the intention of the defendant had been, whether he had intended to get rid of the horses from his boat or to assert any right or dominion over them. "It has never yet been held that

were printed together by an oversight; see Day, C. L. P. Acts, p. 185.

(*a*) See *Keyworth* v. *Hill*, (1820) 3 B. & Ald. 685.

(*b*) See *per* Bramwell, L.J., *Glyn* v. *East India Dock Co.*, (1880) 6 Q. B. D. p. 490; *Burroughes* v. *Bayne*, (1860) 5 H. & N. p. 309; *England* v. *Cowley*, (1873) L. R. 8 Ex. p. 129; *Hiort* v. *Bott*, (1874) L. R. 9 Ex. p. 89.

(*c*) See below, p. 253; and *Spackman* v. *Foster*, (1883) 11 Q. B. D. 99.

(*d*) (1841) 8 M. & W. 540; see also *Houghton* v. *Butler*, (1791) 4 T. R. 364.

the single act of removal of a chattel independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of a chattel. In the present case, therefore, the simple removal of the horses by the defendant for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them is no conversion " (*a*).

Need not be intention to acquire ownership.

The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person truly entitled. In *Tear* v. *Freebody* (*b*) the defendant wrongfully took possession of certain goods, with the intention of acquiring a lien, and it was held that he was guilty of a conversion. Even a still more transitory exercise of dominion may, it would seem, amount to a conversion. " If a man takes my horse and rides it and then redelivers it to me nevertheless I may have an action against him, for this is a conversion, and the redelivery is no bar to the action but shall be merely a mitigation of damages " (*c*). Any asportation of a chattel for the use of the defendant or a third party amounts to a conversion " (*d*). If therefore a man takes and uses the chattel of another in an unauthorised manner, and without further default on his part it is lost, injured, or destroyed before it can be returned to the owner, he is liable for the whole damage.

Constructive taking.

The taking may be constructive merely, as by a transfer on the books of a warehouseman or an indorsement of a document of title (*e*). But a man does not convert goods simply by making a contract for their purchase; the conversion takes place on the acceptance of delivery of the goods or of the document which represents them. A broker, so long as he confines himself to his regular business as a medium of communication between the

(*a*) *Per* Lord Abinger, p. 547. The distinction between trespass and conversion, although in many respects now unimportant, may be very material on the question of damages.

(*b*) (1858) 4 C. B. N. S. 228.

(*c*) Rolle Ab. tit. Action sur Case, p. 5.

(*d*) *Per* Alderson, B., *Fouldes* v. *Willoughby*, (1841) 8 M. & W. p. 548. See *per* Holt, C.J., *Petre* v. *Heneage*, (1701) 12 Mod. p. 520; *Mulgrave* v. *Ogden*, (1590) Cro. Eliz. 219.

(*e*) *M'Combie* v. *Davies*, (1805) 6 East, 538. So there may be a conversion if goods are constructively parted with (*Hiort* v. *Bott*, (1874) L. R. 9 Ex. 86; *Johnson* v. *Stear*, (1863) 15 C. B. N. S. 330; and see *Union Credit Bank* v. *Mersey Docks & Harbour Board*, (1899) 2 Q. B. 205.

parties, is unaffected by the lack of lawful authority in his principals to deal with the goods which are the subject-matter of the contract. But if he does something more than make the contract, if the goods themselves or the document representing them pass through his hands and he actively intervenes in the transfer of possession, then if that transfer is unlawful he becomes himself a wrong-doer (*a*).

By taking possession of premises.

If a man takes possession of premises on which goods are deposited, it is a question for the jury whether it was his intention also to take possession of the goods themselves. In *Thorogood* v. *Robinson* (*b*) the defendant had entered on some land under a writ of possession. He found there two men loading on a barge some lime which was the property of the plaintiff. He turned them off, and refused to let them complete the loading or remove any of the lime. The plaintiff thereupon sued in trover. The jury were asked to consider whether there had been any act indicating an intention to deprive the plaintiff of his property, and if they thought not, to give a verdict for the defendant. It was held that this direction was at least sufficiently favourable to the plaintiff, and some of the Court seem to have doubted whether there was any evidence at all of a conversion (*c*). Nor does a forcible taking possession of premises, under an assignment of lease, and subsequent refusal to deliver up fixtures contained therein amount to a conversion of the premises (*d*).

Taking by duress.

In *Grainger* v. *Hill* (*e*) the defendants obtained from the plaintiff, under threat of executing a warrant of *ca. sa.*, a ship's register, and it was held this amounted to an act of conversion because they had taken it without right, and against the plaintiff's will. But it is not enough if property is surrendered under a threat of

(*a*) See *Hollins* v. *Fowler*, (1874–5) L. R. 7 H. L. 757. The point was not finally decided in this case by the House of Lords because they held that the defendant (plaintiff in error) had taken possession of the goods as a principal. The statements in these last two paragraphs may seem opposed to the opinion of Brett, J. (pp. 775 *et seq.*), but it is apprehended that his observations, though perfectly general in form, were only intended to apply to the case of an agent dealing with goods in ignorance of the true title. This case is dealt with below, p. 251 ; see also *Barker* v. *Furlong*, (1891) 2 Ch. 172.

(*b*) (1845) 6 Q. B. 769.

(*c*) See *Wilde* v. *Waters*, (1855) 24 L. J. C. P. 195, cited below, p. 244, n. (*a*); *Wandsbrough* v. *Maton*, (1836) 4 A. & E. 884, see below, p. 246.

(*d*) *Longstaff* v. *Magoe*, (1834) 2 A. & E. 167.

(*e*) (1838) 4 Bing. N. C. 212.

unpleasant consequences. There must be such duress as to be equivalent to a forcible taking (*a*).

Conversion by parting with goods.

2. A plaintiff who sues for conversion and relies on the fact that the defendant unlawfully parted with the possession of his goods gives the go-by to the question whether that possession was originally acquired wrongfully or innocently; for the moment he is content to treat it as lawful. The defendant on this assumption cannot be guilty of any wrong by merely giving a temporary custody to some servant or agent, since by so doing he does not alter his position (*b*). The wrongful act is done when he purports to give to some stranger, along with the mere possession, some right over the property itself, whether as owner or *dominus pro tempore*. The taking and the giving are, in fact, whether actual or constructive, the different sides of one unlawful transaction, and the transferor and the transferee may be considered as joint wrong-doers.

It is therefore clear that any one who under a contract of sale hands over property in a manner adverse to the right of the person really entitled is guilty of a conversion (*c*). And it would seem to make no difference whether he is the actual vendor or merely entrusted with the property for the purpose of sale as a commission agent or auctioneer (*d*).

In the latter case, however, the mere fact of an auctioneer submitting goods for sale raises a legal presumption that he is authorised to sell. Consequently, although he may have innocently exceeded his authority by so doing, he is nevertheless liable to a *purchaser*, as distinguished from a *bidder*, for loss of bargain (*e*).

Intention to confer special property.

As the unauthorised taking of goods with the intent of thereby asserting a lien or special property is a conversion, so it is a

(*a*) *Powell* v. *Hoyland*, (1851) 6 Ex. 67.

(*b*) *Canot* v. *Hughes*, (1836) 2 Bing. N. C. 448.

(*c*) *Martindale* v. *Smith*, (1841) 1 Q. B. 389.

(*d*) *Featherstonhaugh* v. *Johnstone*, (1818) 8 Taunt. 237; *Cochrane* v. *Rymill*, (1879) 40 L. T. N. S. 744; *Delaney* v. *Wallis*, (1883) 14 L. R. Ir. 31; *Barker* v. *Furlong*, (1891) 2 Ch. 172; *Consolidated Co.* v. *Curtis*, (1892) 1 Q. B. 425. Cp. *National Mercantile Bank* v. *Rymill*, (1881) 44 L. T. N. S. 767. The case of *Turner* v. *Hockey*, (1887) 56 L. J. Q. B. 301, if it is to be taken as deciding anything contrary to what is stated in the text above, is not good law. It has been dissented from both in *Barker* v. *Furlong* and *Consolidated Co.* v. *Curtis*.

(*e*) *Anderson* v. *Croall*, (1903) 6 F. 153, Ct. of Sess.

conversion if a man hands over goods to another so as to give him a lien or special property. "If a person take my horse to ride and leave him at an inn that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me" (*a*).

Assisting in unlawful transfer.

Any one who finding himself in possession of goods hands them over to another takes on himself the risk that such person may have no right to receive them; for if so, he has made himself a party to an unauthorised transfer of possession. In *Hiort* v. *Bott* (*b*), the plaintiffs, in consequence of a telegram from their agent, consigned certain barley to the defendant, and sent him a delivery order on production of which he was entitled to receive the barley from the carriers. The defendant had, in fact, ordered no barley. The agent called on him next day and said that it was a mistake. The defendant thereupon by way of setting matters right, and believing that he was in effect returning the barley to the plaintiffs, indorsed over the delivery order to the agent, who thereby obtained the barley and absconded with the proceeds. It was held that the defendant was liable for a conversion, since he had in effect parted with the plaintiffs' property to a person who had no right to receive it.

Misdelivery by carrier or warehouseman.

It is the duty of a carrier or warehouseman to deliver the goods with which he is entrusted to the person designated by his employer, and, as a general rule, a misdelivery is a conversion (*c*). The duty, however, is not absolute; it is enough if a reasonable and usual course of business is followed, and where there is no breach of duty there can be no conversion (*d*).

Therefore if bills of lading in more than one part have been given for goods shipped on board a vessel and the first part is indorsed over for value, the master may nevertheless deliver the goods to the holder of one of the other parts who first presents

(*a*) *Per* Buller, J., *Syeds* v. *Hay*, (1791) 4 T. R. p. 264.

(*b*) (1874) L. R. 9 Ex. 86.

(*c*) *Devereux* v. *Barclay*, (1819) 2 B. & Ald. 702; *Stephenson* v. *Hart*, (1828) 4 Bing. 476; *Hiort* v. *London & North Western R. Co.*, (1879) 4 Ex. D. 188. See, however, the observations of Martin, B., *Crouch* v. *Great Northern R. Co.*, (1856) 11 Ex. pp. 756–7. For effect of the estoppel raised by attornment, see *Henderson* v. *Williams*, (1895) 1 Q. B. 521.

(*d*) *Heugh* v. *London & North Western R. Co.* (1870) L. R. 5 Ex. 51; *M'Kean* v. *M'Ivor*, (1870) L. R. 6 Ex. 36.

himself, provided he has no notice of the right of the indorsee for value (*a*).

Goods lost or destroyed.

There can be no conversion where there is no voluntary act. Therefore if goods are by accident or carelessness lost or destroyed the bailee or other possessor cannot be sued in this form of action. He may be liable on his contract, or for negligence (*b*), or in detinue (*c*).

And where goods are given into the sole custody of a person and accepted by him as a bailee, should they be lost while in his custody, the onus lies on him to show circumstances negativing negligence on his part (*d*).

Apparently, however (apart from special agreement), a bailee is not liable to his bailor for damage to the chattel bailed when such damage was caused by the bailee's servant negligently doing some act, resulting in damage to the chattel, that was not within the scope of his employment (*e*).

Duty of distraining landlord.

A landlord who has removed goods under a distress is not bound to hand over the surplus which may remain after he has sold sufficient to satisfy his rent to the true owner, even if he have notice of his claim. He has a legal right over them derived from the fact of their being found on the demised premises, and in the exercise of this right is not bound to concern himself with questions of title (*f*).

Conversion by sale in market overt.

3. Unless it be in market overt, there can be no conversion by a mere bargain and sale without a transfer of possession; such an act is void and does not change the property or the possession (*g*); but in market overt the property is passed to the purchaser by the sale, which is therefore equivalent to physical destruction, and the vendor is liable in trover to the true owner (*h*) though the goods be never delivered to the purchaser in pursuance of such sale.

(*a*) *Glyn, Mills & Co.* v. *East & West India Dock Co.*, (1880-2) 7 App. Cas. 591.

(*b*) *Ross* v. *Johnson*, (1772) 5 Burr. 2825; see *Heald* v. *Carey*, (1852) 11 C. B. 977.

(*c*) See below, p. 254.

(*d*) *Phipps* v. *New Claridge's Hotel, Ltd.*, (1905) 22 T. L. R. 49.

(*e*) *Sanderson* v. *Collins*, (1904) 1 K. B. 628, C. A.

(*f*) *Evans* v. *Wright*, (1857) 2 H. & N. 527; *Yates* v. *Eastwood*, (1851) 6 Ex. 805.

(*g*) *Lancashire Waggon Co.* v. *Fitzhugh*, (1861) 6 H. & N. 502; *Consolidated Co.* v. *Curtis & Son*, (1892) 1 Q. B. p. 498, *per* Collins, J.

(*h*) See *per* Parke, B., in *Farrar* v. *Beswick*, (1836) 1 M. & W. p. 688; *Delaney* v. *Wallis*, (1885) 14 L. R. Ir. 31.

Conversion by keeping.

Demand and refusal.

4. The ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant having it in his possession refused to give it up on demand made by the party entitled. But this demand must be for specific chattels, where therefore a plaintiff entitled to claim five best beasts as heriots marked seven and allowed all to remain in the custody of the defendant; a general demand by the plaintiff for the heriots, without specifying the particular beasts claimed by him, would not support an action for the conversion of any one of them (*a*). It is not, however, necessary that at the time of the demand made the defendant should be so far in a position to return the property, that he has it in his custody or under his control. If he has been in possession but has previously destroyed it or parted with it voluntarily, such dealing amounts to a conversion, and the plaintiff, after demand and refusal, is entitled to sue the defendant in detinue (*b*). If, however, the goods in question are actually seized under a legal process while in the defendant's possession, he is not answerable in trover because he does not do what is out of his power and deliver them on demand (*c*). It not unfrequently happens that by the defendant's language or conduct at the time of the demand he expressly or impliedly admits that he could return them if he thought fit. In *Catterall* v. *Kenyon* (*d*), an action was brought against an innkeeper and his wife. Certain cattle of the plaintiff wrongfully taken in execution had been left in a stable of the inn. The plaintiff demanded them several times of the wife, who after some negotiation finally refused to hand them over, on the ground that she had received an indemnity. It was held that this was good evidence of possession and a conversion by the wife, for which both husband and wife, by reason of the relation existing between them, were answerable to the plaintiff in trover (*e*).

(*a*) *Abington* v. *Lipscomb*, (1841) 1 Q. B. 776.

(*b*) *Wilkinson* v. *Verity*, (1871) L. R. 6 C. P. 206. As will be seen where the defendant is under a contractual duty to return a chattel which is not in his possession, he is liable in detinue if he, contrary to the terms of his contract, fails to return it on demand. See below, p. 255.

(*c*) *Verrall* v. *Robinson*, (1835) 2 C. M. & R. 495, explained *Pillott* v. *Wilkinson*, (1864) 3 H. & C. 345.

(*d*) (1842) 3 Q. B. 310.

(*e*) See, too, *M'Keown* v. *Cotching*, (1857) 27 L. J. Ex. 41, for implied admission of a possession and destruction.

Conversion by agent in charge of goods.

Although it is no answer for a person who unlawfully refuses to give up property of which he has the custody to say that he was merely acting as an agent or servant (*a*), yet in enquiring whether a defendant was actually possessed it may be material to consider his exact position towards the goods in question. A servant who has the care of goods on his master's premises cannot, as a general rule, be said to be in possession of them (*b*). In *Alexander* v. *Southey* (*c*), the defendant had the charge of a warehouse for his employers and kept the key. The plaintiff demanded certain of his goods which were deposited there, and not obtaining them, at once commenced an action. The point decided was that the defendant had not refused in such a manner as to afford reasonable evidence of a conversion. The majority of the Court were however of opinion that had a sufficient refusal been proved the servant might have been liable.

Refusal only evidence of a conversion.

The mere fact of a refusal in answer to a demand is never of itself a conversion, though it may be very strong evidence of it. In *Mires* v. *Solebay* (*d*) the Court refused to give judgment on a special verdict showing a demand and refusal, saying that the fact of the conversion ought in terms to have been found by the jury.

Demand must be unconditional.

The demand should be unconditional in its terms. In *Rushworth* v. *Taylor* (*e*) the defendant, having been entrusted with the plaintiff's gun, damaged it. The plaintiff sent him a written notice to return the gun in the same good plight and condition as he had received it. It was held that a failure on the part of the defendant to comply with the demand could not by itself be sufficient evidence of a conversion.

Refusal must be unconditional.

The refusal must also be unconditional. A person on whom a demand for goods is made may not have them in his immediate custody though they are under his control; he may be the agent of another, or he may be under the belief that he has himself

(*a*) *Cranch* v. *White*, (1835) 1 Bing. N. C. 414; *Davies* v. *Vernon*, (1844) 6 Q. B. 443.

(*b*) *Mires* v. *Solebay*, (1678) 2 Mod. 242, explained in *Davies* v. *Vernon*, *supra*. It is said in the case itself, that a servant can never be liable for a mere non-feasance when he acts on his master's behalf, but only for a misfeasance. This distinction, however, is not recognised in modern cases.

(*c*) (1821) 5 B. & Ald. 247. But see *Stephens* v. *Elwall*, (1815) 4 M. & S. 259.

(*d*) (1678) 2 Mod. 242.

(*e*) (1842) 3 Q. B. 699.

some right or title to the property. In all these cases it is not reasonable that he should be called upon to act at a moment's notice (*a*). He requires time to get the goods into his own hands, to consult his principal, to satisfy himself as to the claimant's right. If he refuses simply in order to gain this time, and not intending a final denial of the claimant's right, it is no conversion. In *Alexander* v. *Southey* (*b*) the defendant being in charge of a warehouse, as servant of an insurance company, in which were certain goods of the plaintiff's, declined to give them to him without an order from his employers. Upon this the plaintiff at once brought his action. It was left to the jury to say whether the defendant had acted reasonably and, they having found in his favour, the Court refused to disturb the verdict; doubting even whether there was any evidence of a conversion. "If," said Bayley, J., "the plaintiff in this case had informed the defendant that he had previously made application to the insurance company and that they had refused permission for the delivery of the property, or had told the defendant that he expected him to go and get an order authorising the delivery of the property, and after that the defendant had refused either to deliver the goods or to go and get such an order, I think it would have amounted to a conversion on his part, but here the defendant had the goods in his possession as the agent of the insurance company, and he would not have done his duty if he had given them up without an application to his employers" (*c*). Accordingly in a later case (*d*) where a warehouseman refused to give up goods without an order, and being thereupon invited to consult with his principal and warned that it was intended to bring an action against him, neglected to take any further steps, the Court inferred that he was guilty of a conversion. But apparently a refusal to deliver up goods to the true owner by a person who was ignorant of his identity is not evidence of a conversion (*e*).

Delay in complying with demand.

In *Pillott* v. *Wilkinson* (*f*) the plaintiff had bought certain

(*a*) *Alexander* v. *Southey*, (1821) 5 B. & Ald. 247; *Towne* v. *Lewis*, (1849) 7 C. B. 608; *Clark* v. *Chamberlain*, (1836) 2 M. & W. 78.

(*b*) *Supra.*

(*c*) (1821) 5 B. & Ald. p. 248.

(*d*) *Wilson* v. *Anderton*, (1830) 1 B. & Ad. 450. For an interesting *résumé* of the law of detinue, see *Cullen* v. *Barclay*, (1881) 10 L. R. Ir. 224.

(*e*) *Green* v. *Dunn*, (1811) 3 Camp. 215 n., and see *Thorne* v. *Tilbury*, (1858) 3 H. & N. 534.

(*f*) (1864) 3 H. & C. 345.

wine warehoused with the defendant, and was the indorsee of the warrant. He called at the warehouse to demand possession, and was told by a clerk, as was the fact, that notice of an attachment of the wine had been served out of the Mayor's Court, and that consequently there was a difficulty about the matter. The plaintiff then went to look for the defendant, but not finding him, sent a letter to intimate that unless he received a satisfactory answer by next morning he should take proceedings. In reply the defendant wrote requesting further time for consideration, and thereupon a writ was issued. The plaintiff having obtained a verdict, the Court below and the Exchequer Chamber refused to order a new trial (*a*), it being a question for the jury whether the defendant had a *bonâ fide* doubt as to the plaintiff's right of possession, and whether a reasonable time had elapsed for clearing up such doubt (*b*).

Responsibility on qualified refusal.

It would seem that if a defendant has given a qualified refusal, it becomes his duty, after reasonable opportunity of enquiry and consideration, to hand over the goods, and he cannot excuse himself when the time has come by showing that in the interval they have passed out of his control, at any rate, if there has been any default on his part. In *Burroughes* v. *Bayne* (*c*) the defendant had seized certain furniture under a bill of sale by putting a man in possession. The plaintiffs claimed a billiard table, which was part of the furniture. The defendant asked time to consider. Two days later the plaintiffs sent for their billiard table, having previously given notice of their intention to do so; but they were unable to obtain possession as it was locked up in a room. This had not been done by the defendant's authority, as he had in effect given up his claim and withdrawn from possession. Bramwell, B., held that there was no evidence of a conversion, because the plaintiffs had agreed to the first delay, and, subsequently on the second demand, the defendant had no control over the table or responsibility for it. The majority of the Court, however, decided that as the defendant had had an opportunity of handing over the table and delayed doing so for

(*a*) Bramwell, B., *diss.*

(*b*) See, too, *Vaughan* v. *Watt*, (1840) 6 M. & W. 492; *Lee* v. *Bayes*, (1856) 18 C. B. 599.

(*c*) (1860) 5 H. & N. 296.

his own purposes, he had taken on himself the duty of carrying out the delivery on a subsequent occasion (*a*).

Other evidence of unlawful keeping.

A demand and refusal is not the only evidence of an unlawful keeping. There may be a conversion of a chattel by the use and enjoyment of it in a manner altogether inconsistent with the right of the owner. Thus if a person is entrusted with the custody of a cask of wine, and bottles the wine for his own consumption, it would seem there is some evidence of a conversion even though none of the liquor be actually drunk (*b*).

In *Falk* v. *Fletcher* (*c*) the plaintiff having shipped a certain portion of a cargo on board the defendant's vessel, disputes arose, and the master subsequently refused to give the plaintiff bills of lading in his own name and sailed on his voyage, and ultimately refused to deliver the goods to the plaintiff's agent at the port of destination. It was held that there had been a conversion when the ship sailed away. But in a later case (*d*) where the master had refused to sign bills of lading except in a certain form, and sailed away, but subsequently made a proper tender of the cargo to the plaintiff at the port of destination, it was held that though the master had committed a breach of contract by not giving bills of lading, yet he had not been guilty of a conversion, because he had always held the goods for the plaintiff; whereas in *Falk* v. *Fletcher* there had been a repudiation of the rights of the owner of the cargo in the very inception of the voyage.

In the recent case of *Turner and Another* v. *Hagi Goolam Mahomed Azam* (*e*), where, though no allegation of a conversion was made, the refusal to deliver seems to have amounted to one,

(*a*) It is suggested by Maule, J. (*Wilde* v. *Waters*, (1855) 24 L. J. C. P. p. 195), that under certain circumstances a man may be in possession of a chattel without title, and yet not be bound to deliver it on the demand of the owner. "Where an outgoing tenant leaves a picture hanging on a wall, the new tenant may refuse to admit the owner of the picture to take it, and may not choose to put himself to the trouble of giving it, but the picture is still the owner's chattel. The question in such a case would be whether the jury could infer from the refusal that the new tenant exercised any dominion over the chattel. If it appeared that he had merely said, 'I don't want your chattel, but I shall not give myself any trouble about it,' that would not give the owner an action of trover." The view here expressed, however, seems inconsistent with *Thorogood* v. *Robinson*, (1845) 6 Q. B. 769; see above, p. 236.

(*b*) *Philpott* v. *Kelley*, (1835) 3 A. & E. 106.

(*c*) (1865) 18 C. B. N. S. 403.

(*d*) *Jones* v. *Hough*, (1879) 5 Ex. D. 115.

(*e*) (1904) A. C. 826, P. C.

the ship owners claimed a right of lien on goods belonging to the sub-charterer of the ship in respect of a debt that was due to them from the original charterer. It was, however, held that no such right existed, and that the sub-charterer, having paid his bill of lading freight, was entitled to his goods free of any lien.

Refusal to attorn no conversion.

In no case has it been decided that a possessor of a chattel renders himself answerable for a conversion merely by a refusal to attorn to the real owner and acknowledge his title, apart from any unlawful dealing with the chattel itself. Thus if a man purchase goods in a warehouse he can bring an action against the warehouseman if there is a refusal to deliver on payment of charges, although there would probably be no liability incurred by a refusal to enter the purchaser's name on the books of the warehouse (*a*). Where, however, a warehouseman receiving goods from a consignee, who has actual possession of them, to keep for his use, subsequently learns that the right of his bailee has been evicted by title paramount, he may refuse to redeliver them without being guilty of a conversion (*b*).

Conversion by destruction.

5. A conversion by destruction takes place not merely when a chattel is burnt or broken to pieces, but when it is so dealt with that its identity is destroyed. Therefore, if a man draw wine out of a cask and fill up the deficiency with water, he converts the whole cask as to part by taking the wine, as to the residue by turning it into something different and therefore destroying it (*c*). So to spin cotton into yarn, to grind corn into flour, or to apply any process of manufacture to raw material, may undoubtedly be an act of conversion if done without the authority of the person entitled (*d*). But provided the chattel continues to exist as such, any injury done to it is a trespass and nothing more. Therefore in *Simmons* v. *Lillystone* (*e*), where the defendant having sawn asunder a log of timber belonging to the plaintiff was sued for a

(*a*) In *M'Combie* v. *Davies*, (1805) 6 East, 538, the defendant's name appeared on the books of the king's warehouse as the owner of certain tobacco deposited there. The plaintiff being the real owner called upon him to give a delivery order. The defendant refused. Lord Ellenborough held that this was no conversion, apparently considering it a mere neglect to acknowledge the plaintiff's title. The other judges more correctly treated the case as one of demand and refusal.

(*b*) *Ross* v. *Edwards*, (1895) 73 L. T. 100, P. C.

(*c*) *Richardson* v. *Atkinson*, (1723) 1 Stra. 576; cp. *Philpott* v. *Kelley*, (1835) 3 A. & E. 106.

(*d*) Com. Dig. Action Trover E.

(*e*) (1853) 8 Ex. 431.

conversion, it was held that this particular form of action did not lie.

Conversion by preventing removal of chattel.

The above classification will be found to include the great majority of instances in which the question of conversion can arise, but it is perhaps impossible to frame a definition which shall cover every conceivable case. In *England* v. *Cowley* (*a*), it was much discussed whether a defendant who has never had any possession of the property in question, constructive or actual, can be held liable in trover simply by preventing the owner exercising over it his right of property. The plaintiff was the holder of a bill of sale over certain goods in a house of which the defendant was landlord. He had put a man in possession and was about to remove the goods. The defendant was also desirous of seizing under a distress, but the time being after sunset he could not lawfully effect his purpose until the next morning. He however informed the plaintiff that the removal would not be permitted, and stationed a man to prevent it. The plaintiff therefore desisted from the attempt and subsequently brought an action in which he relied upon the interference with the removal as an act of conversion. It was held by Martin, B., that the action was maintainable; by Pollock, B., that a mere threat unaccompanied by any forcible act could not be called an interference with the plaintiff's property; by Bramwell, B., and Kelly, C.B., that the plaintiff had simply been prevented from using the furniture in a particular way, and that therefore there was no conversion. In *Wansbrough* v. *Maton* (*b*) the plaintiff had occupied land of the defendant, which he subsequently quitted, and a new tenant entered. The plaintiff left on the land a certain movable barn, which he subsequently sent men to remove, but the defendant meeting them on the ground ordered them off. It was held that the plaintiff had a good cause of action, although the defendant was not in possession. In neither of these cases was there any interference with the goods themselves or any unlawful detention; in the latter there would seem to have been an absolute denial and repudiation of the plaintiff's right, in the former not.

(*a*) (1873) L. R. 8 Ex. 126; see, too, *Hartley* v. *Moxham*, (1842) 3 Q. B. 701.

(*b*) (1836) 4 A. & E. 884.

Actions between co-owners.

If two or more people own a chattel either jointly or in common, one of them cannot bring an action against the others merely for an interference with his right of possession, since the possession of each is alike lawful, and the manner of its exercise is left by the law to be settled among the parties themselves (*a*). Although there is apparently no "rule of law which would debar the other co-owner from bringing an action for that conversion," if the particular facts of the case show that (*b*) one co-owner has deprived the other of all possible use and enjoyment of the property, either in the present or the future, then he has been guilty of an act of conversion. "It is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it" (*c*). Short, therefore, of "destruction or something equivalent," one co-owner may exercise the full rights of property over a chattel in defiance of the wishes of the other co-owners, without being guilty of a tort. He may destroy its identity by the process of manufacture (*d*); he may create a lien on it (*e*); he may sell it otherwise than in market overt (*f*). And this immunity extends to those who stand in his shoes. If a sheriff seizes partnership property under an execution against one of the firm, he becomes part owner, and this part ownership protects him, even though he purports to sell the entire interest in the goods (*g*). But where by arrangement between two co-owners it was agreed that one of them should have exclusive possession of a chattel, and the other having obtained temporary possession unlawfully pledged it, the first successfully maintained an action against the pledgee in respect of his exclusive right of possession (*h*). If co-owners jointly pledge property, and one of them without the authority of the other afterwards demands the property back tendering the

(*a*) Co. Litt. p. 200a.

(*b*) *Poisson* v. *Robertson and Another*, (1902) 86 L. T. 302.

(*c*) *Per* Parke, B., *Morgan* v. *Marquis*, (1854) 9 Ex. p. 148.

(*d*) *Fennings* v. *Lord Grenville*, (1808) 1 Taunt. 241; *Jacobs* v. *Seward*, (1872) L. R. 5 H. L. 464.

(*e*) *Jones* v. *Brown*, (1856) 23 L. J. Ex. 345.

(*f*) *Mayhew* v. *Herrick*, (1849) 7 C. B. 229. In *Barton* v. *Williams*, (1822) 5 B. & Ald. 395, some of the judges held that a mere sale might be an act of conversion as between two co-owners, but this has been repeatedly disapproved of.

(*g*) *Mayhew* v. *Herrick*, *supra*.

(*h*) *Nyberg* v. *Handelaar*, (1892) 2 Q. B. 202.

amount due, the pledgee is not guilty of a conversion by refusing to deliver (*a*). And if a bailee receive a deposit from joint bailors, in the absence of a special contract to deliver only to a joint application, a plea of delivery to one bailor is a sufficient answer to an action for conversion by the others (*b*).

Destruction of interest of co-owner.

A sale in market overt by one co-owner without authority from the other is "equivalent to a destruction," because it transfers the property and entirely defeats the interests of the non-consenting party, who therefore would be altogether without remedy unless he might sue his companion (*c*). And although an ordinary taking or selling may not be a conversion, yet if the result is, even as a somewhat remote consequence, that it becomes impossible for the property to be restored, an action of trover will lie. This appears from the case of *Barnardiston* v. *Chapman* (*d*). The plaintiff was the tenant in common of one moiety of a ship, the defendants tenants in common of the other moiety. The defendants forcibly took a ship out of the plaintiff's possession, secreted it from him, changed the name, and afterwards handed it over to a third party, who sent it on a voyage, in the course of which it became a total loss. It was left to the jury to say whether there had not been a destruction by the defendants' means, and they having found for the plaintiff the Court refused to disturb the verdict.

Defendant's ignorance of plaintiff's title.

The question not unfrequently arises in actions of trover how far the defendant's ignorance of the unauthorised character of his act can be relied upon as a defence. In most cases of conversion —not in all, as for instance where there is conversion by destruction—there are two elements, first of all a dealing with the goods in a manner inconsistent with the right of the person entitled to them; secondly, an intention in so doing to deny his right or to assert a dominion which is in fact inconsistent with such right. Ignorance of the right will not affect the quality of the act done,

(*a*) *Harper* v. *Godsell*, (1870) L. R. 5 Q. B. 422; see *Atwood* v. *Ernest*, (1853) 13 C. B. 881, a case of detinue; see also *Wright* v. *Robotham*, (1886) 33 Ch. D 106.

(*b*) *Broadbent* v. *Ledward*, (1839) 11 A. & E. 209.

(*c*) *Per* Parke, B., *Farrar* v. *Beswick*, (1836) 1 M. & W. p. 688.

(*d*) Cited *Heath* v. *Hubbard*, (1803) 4 East, p. 121; see, too, *Mayhew* v. *Herrick*, (1849) 7 C. B. 229.

but it may have a material bearing on the question of intention. If a man taking a flock of sheep from a market by mistake drives among them a sheep which does not belong to him, it is a trespass, for it is an asportation of a chattel without the owner's consent (*a*), but it is not, it is apprehended, a conversion, for there is no intention to assert dominion over that particular sheep or to interfere with the right of the true owner.

Agents.

It is principally in considering the liability of agents in dealing with goods that it becomes material to enquire into their knowledge of the true ownership. Where a man deals with goods as principal an intention to exercise dominion may be generally inferred from the nature of the act itself, but such inference does not equally arise in the case of an agent who acts on his instructions without necessarily knowing what the intention of his principal is.

Exercise of dominion in right of self.

(a) A defendant is always liable if "he has taken the goods as his own, or used them as if they were his own" (*b*). The rule is that "persons deal with property in chattels or exercise dominion over them at their peril" (*c*). On this principle it was decided in *M'Combie* v. *Davies* (*d*) that a defendant who innocently took goods in pledge from a person wrongfully dealing with them was liable in trover at the suit of the real owner. Where, however, a *mercantile agent* is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent to a person taking under the disposition in good faith, shall, subject to the provisions of the Factors Act, 1889 (even though in fraud of the true owner), be as valid as if he were expressly authorised by the owner of the goods to make the same. It is also provided by s. 25 (sub-s. 2) of the Sale of Goods Act, 1893, that where a person (other than a factor) having bought, or agreed to buy, goods obtains possession of them with the consent of the seller, any subsequent sale of the goods (though fraudulent) to a

(*a*) *Reg.* v. *Riley*, (1853) 1 Dears & Pearce C. C. 149.

(*b*) *Per* Brett, J., *Fowler* v. *Hollins*, (1872) L. R. 7 Q. B. p. 627.

(*c*) *Per* Cleasby, B., *ibid.* p. 639.

(*d*) (1805) 6 East, 548. See, however, the *dictum* of Bramwell, B. (*Burroughes* v. *Bayne*, (1860) 5 H. & N. p. 310); and of Coleridge, J., in *Mennie* v. *Blake*, (1856) 6 E. & B. p. 851.

purchaser in good faith and without notice, shall absolutely vest the property in such purchaser.

On behalf of another.

(b) When a person, though only as agent, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of this fact does not protect him, for he has clearly intended an act which is inconsistent with the right of the true owner. Thus, where the defendant's employer had bought goods of a bankrupt, and the defendant not knowing of the bankruptcy took delivery of the goods and forwarded them, it was held that he was liable in trover to the assignees of the bankrupt (*a*). "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless, his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it" (*b*). So, formerly, if a sheriff seized and sold under an execution, and the debtor had then committed a secret act of bankruptcy on which he was afterwards adjudicated bankrupt, the assignees might sue the sheriff for the conversion of the bankrupt's goods (*c*). So, if an auctioneer sells goods and hands over the proceeds to his principal without notice of any defect in his title, the true owner may recover from him the value over again (*d*).

Agent not intending to alter property.

(c) If an agent intermeddles merely with the custody of a chattel in ignorance of his principal's lack of title, and also in ignorance that any alteration of property is intended, he is not guilty of a conversion. "The true proposition as to possession and detention and asportation seems to be that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels is not a conversion" (*e*). On this principle a forwarding agent who packs and ships goods does not render himself liable

(*a*) *Stephens* v. *Elwall*, (1815) 4 M. & S. 259.

(*b*) *Per* Lord Ellenborough, p. 261.

(*c*) *Garland* v. *Carlisle*, (1837) 4 Cl. & F. 693. Now, however, the sheriff in such cases is protected: 46 & 47 Vict. c. 52, ss. 45, 46.

(*d*) *Cochrane* v. *Rymill*, (1879) 40 L. T. N. S. 744; see below, p. 252, and see *The Consolidated Co.* v. *Curtis*, (1892) 1 Q. B. 495; 61 L. J. Q. B. 325.

(*e*) *Per* Brett, J., *Fowler* v. *Hollins*, (1872) L. R. 7 Q. B. p. 630.

because his employer had no title (*a*), apparently upon the ground that the act of the forwarding agent is so purely ministerial that, if performed in good faith and without notice, no presumption of a conversion can be raised therefrom. So, a carrier who receives goods and delivers them in accordance with the directions of the consignor, without notice of any adverse title, is free from responsibility (*b*). This case of the carrier has been put on the special ground that he exercises a public employment and has no choice as to refusing or accepting goods. But it is really only an exemplification of the wider principle. Even a common carrier, if he knowingly assisted at a transfer of property, might be answerable, just as the sheriff was in *Garland* v. *Carlisle*, though he, too, was bound to perform his public duty.

Lord Blackburn's view.

The principle is explained by Blackburn, J., in *Hollins* v. *Fowler* (*c*) in the following manner. After pointing out that originally the action of trover assumed a possession by finding, innocent in the first place, on the part of the defendant, he says: "I cannot find it anywhere distinctly laid down, but I submit to your lordships that on principle one who deals with goods at the request of a person who has the actual custody of them in the *bonâ fide* belief that the custodier is the true owner or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was the finder of goods or entrusted with their custody." Accordingly, if a farrier shoes a horse and sends it home, if a warehouseman stores goods and then returns them, if a carter shifts furniture from one house to another—in none of these cases will the agent or bailee be liable simply because his principal or bailor had no right over the goods.

Lord Esher's view.

On the other hand, in the application of the principle that an asportation without reference to the question of the property is no conversion, Brett, J. (*d*), in the same case took a view much more favourable to the agent. He thought that an agent who

(*a*) *Greenway* v. *Fisher*, (1824) 1 C. & P. 190.

(*b*) See *per* Willes, J., *Sheridan* v. *New Quay Co.*, (1858) 4 C. B. N. S. p. 650; *per* Martin, B., *Fowler* v. *Hollins*, (1872) L. R. 7 Q. B. p. 632.

(*c*) (1874-5) L. R. 7 H. L. pp. 766-7. And see *per* Cave, J., *M'Entire* v. *Potter*, (1889) 22 Q. B. D. p. 441.

(*d*) L. R. 7 H. L. pp. 779—785.

forwarded goods on behalf of his principal to a purchaser, though with the object of carrying out the sale, did so without reference to the question of property (*a*).

Auctioneer selling and delivering.

An auctioneer who sells and delivers in the ordinary course is more than a mere broker or intermediary, and more than a packer or carrier of goods who merely purports to change the position of the goods and not the property in them; if he receives goods for sale, and on selling them hands them over with the view of passing the property in them, he will be liable for conversion if the vendor had no title (*b*). But an auctioneer may act as a mere broker, confining himself to the negotiation of the sale, and leaving his principal to deliver possession, in which case his act is no conversion (*c*).

Selling without delivering.

Delivering without selling.

In *National Mercantile Bank* v. *Rymill* (*d*) the plaintiffs were the holders of an absolute bill of sale whereby one Seaman assigned to them *inter alia* certain horses and harness. Seaman afterwards, without the knowledge of the plaintiffs, took the horses and harness to the defendant's repository and entered them for sale in his books, and they were catalogued for sale by auction on the following day. Before they were put up for auction, Seaman sold them privately to Townsend, who paid the purchase-money to the defendant, and the latter after deducting his commission paid the balance to Seaman, and ordered the delivery of the horses and harness to Townsend. It was held, that as there was no sale by Rymill he was not guilty of a conversion, and the case was therefore distinguished from *Cochrane* v. *Rymill* (*e*), where the defendant himself sold, being entitled to a lien for an advance which he had made, and where he purported to transfer the right of property in the goods. The existence of the defendant's lien in *Cochrane* v. *Rymill* makes no difference except as a fact negativing the suggestion that he was a mere agent or conduit-pipe in that particular case (*f*), and the

(*a*) See the remarks of Collins, J., upon these opposing views, in *Consolidated Co.* v. *Curtis & Son*, (1892) 1 Q. B. p. 501.

(*b*) *Consolidated Co.* v. *Curtis & Son*, (1892) 1 Q. B. 495; *Cochrane* v. *Rymill*, (1879) 40 L. T. N. S. 744; *Barker* v. *Furlong*, (1891) 2 Ch. 172.

(*c*) See the case put by Bramwell, L.J., *Cochrane* v. *Rymill*, (1879) 40 L. T. N. S. p. 746.

(*d*) (1881) 44 L. T. N. S. 307, 767.

(*e*) (1879) 40 L. T. N. S. 744.

(*f*) *Per* Collins, J., *Consolidated Co.* v. *Curtis & Son*, (1892) 1 Q. B. p. 502.

real distinction, if the cases be not inconsistent, must be that in *Cochrane* v. *Rymill* the defendant in fact sold, in *National Mercantile Bank* v. *Rymill* he only delivered the goods, but with knowledge of the sale and with the intention of enabling it to be carried out. Whether the latter case is consistent with *Stephens* v. *Elwall* (*a*) may be doubted.

Breach of warranty by auctioneer.

It is a breach of warranty, sounding either in damages as against the auctioneer or, justifying a rescission of contract as against a principal, for an auctioneer to make a specific statement with respect to the chattel that he is selling which, to his knowledge, is not a fact. Thus if an auctioneer sell a chattel as being the property of a particular person, of known repute, and that person has prior to the sale, to the knowledge of the auctioneer, parted with his interest in the chattel to a third party, on whose behalf the sale is actually made, the alteration in ownership has been held to constitute a sufficient ground for rescinding the contract (*b*).

Again, a secret limitation of authority at a sale "without reserve," such as reserve price, if known to the auctioneer but not known to the buyer, will entitle the latter to damages for non-delivery (*c*) as soon as the hammer has fallen and he has been declared purchaser (*d*), provided a note or memorandum of the sale has been made.

In the case of *Spackman* v. *Foster* (*e*) certain title deeds of the plaintiff had been pledged with the defendant by a third party wrongfully. It was held that the defendant had not been guilty of a conversion by taking them in pledge. "The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositee or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited

(*a*) As to which, see above, p. 250.

(*b*) *Whurr* v. *Devenish*, (1904) 20 T. L. R. 385.

(*c*) *Rainbow* v. *Howkins*, (1904) 2 K. B. 322.

(*d*) *Fenwick* v. *Macdonald, Fraser & Co.*, (1904) 6 F. 850, Ct. of Sess.

(*e*) (1883) 11 Q. B. D. 99; approved by Kay, L.J., *Miller* v. *Dell*, (1891) 1 Q B. p. 473. The principle of *Spackman* v. *Foster* seems to be that a person who innocently takes a chattel by assignment from one who is not the true owner, is not guilty of a conversion by the mere taking, but only becomes so if and when, either by parting with it or by damaging it, he has put it out of his power to deliver it on demand to the true owner in the same condition as that in which he received it.

them, but not against the real owner" (*a*). A pledgee, however, takes the pledge with a warranty of title, intending to obtain a special property which gives him a power of sale (*b*). He is acting just as inconsistently with the right of the true owner as if he actually purchased (*c*). This decision is directly in conflict with Lord Ellenborough's judgment in *M'Combie* v. *Davies* (*d*), and the earlier case seems more in accordance with the general course of the authorities, and with the observations in *Hollins* v. *Fowler*. In cases of an unauthorised deposit of securities, belonging to a third party, by a solicitor, broker or other agent, with bankers to secure an advance, the claim of the true owner is subordinated to that of the pledgee, who receives in good faith and without notice, the equitable principle underlying such transaction apparently being that, where one of two innocent persons has to suffer a loss, it should fall on that one of the two who could most easily have prevented the happening or recurrence of the mischief (*e*).

Detinue.

The action of detinue was based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by a refusal to deliver it up on demand, and the redress claimed was not damages for the wrong but the return of the chattel or its value. The old form of declaration was either in *detinue sur trover*, alleging a finding by the defendant, or in *detinue sur bailment*, alleging a bailment to him. These allegations, which were immaterial and not traversable, were abolished by the Common Law Procedure Act of 1852 (*f*). In truth, however, though the two kinds of detinue were thus confused, the distinction between detinue where there had been a bailment and detinue where there had not was a fundamental one. The former was essentially an action in contract, the latter especially in tort (*g*).

Sur trover and *sur bailment.*

(*a*) *Per* Grove, J., at p. 100.

(*b*) See Story on Bailments, ss. 308, 354.

(*c*) In *Tear* v. *Freebody*, (1858) 4 C. B. N. S. 228, it was held that a taking with a view to acquiring a lien might be a conversion. See above, p. 235.

(*d*) (1805) 6 East, 538.

(*e*) *Mutton* v. *Peat*, (1900) 2 Ch. 79, C. A. See also *Oliver* v. *Bank of England*, (1902) 1 Ch. 610, C. A.

(*f*) Chitty on Pleading, 7th ed. vol. 1, p. 135; vol. 2, p. 428; *Gledstane* v. *Hewitt*, (1831) 1 C. & J. 565; 15 & 16 Vict. c. 76, s. 49.

(*g*) See note, *Walker* v. *Needham*, (1841) 3 M. & G. p. 561 As to whether detinue was contract or tort, see *Broadbent* v. *Ledward*, (1839) 11 A. & E. 209; *Gledstane* v. *Hewitt*, *supra*; *Bryant* v. *Herbert*, (1878) 3 C. P. D. 189 & 389.

Distinction between two kinds of bailment where goods have been parted with.

It has been already pointed out that there cannot be a conversion by mere demand and refusal unless at the time of the demand the defendant had it in his power to return the property (*a*). If, however, a bailee unlawfully or negligently loses or parts with possession he cannot get rid of his contractual liability to restore the bailor's property on the termination of the bailment, and if he fails to do so he may be sued in detinue (*b*). But this rule does not always seem to apply in the case of a defendant who is a mere stranger. It was very early said (*c*) that "if a man comes into possession by a bailment then he is answerable by virtue of the bailment, and if he bails the goods over, or they are taken from his possession, still he is answerable to the bailor by virtue of the bailment. But otherwise, if a man comes by goods by finding, for he is only answerable by reason of his possession, and if, without wrongful act (*loialment*), he is out of possession before he who has the right has brought his action, he is not answerable" (*d*).

In accordance with this principle, it was held in *Crossfield* v. *Such* (*e*), that an administratrix could not recover in detinue against a defendant who had taken possession of certain property of the intestate on her decease and parted with it before administration was granted. In *Wilkinson* v. *Verity* (*f*), the plaintiffs' predecessors in title had bailed certain goods to the defendant, who wrongfully sold them. More than six years later the plaintiffs demanded the property back, and not obtaining it, brought an action of detinue. The Statute of Limitations being pleaded, it was held that a fresh cause of action had arisen on the refusal to deliver. "But," said the Court (*g*) "where the action of detinue is founded upon a wrongful conversion of the property only, as it needs must where there is a bare taking and withholding of the property of another without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or the breach of the original terms, the statute would run

(*a*) See above, p. 240.

(*b*) *Reeve* v. *Palmer*, (1858) 5 C. B. N. S. 84 & 93; *Jones* v. *Dowle*, (1841) 9 M. & W. 19.

(*c*) 27 Hen. VIII. 13 pl. 35.

(*d*) See *South Staffordshire Waterworks Co.* v. *Sharman*, (1896) 2 Q. B. 44.

(*e*) (1853) 8 Ex. 228.

(*f*) (1871) L. R. 6 C. P. 206.

(*g*) p. 210.

from the time at which the property was first wrongfully dealt with." It therefore appears (*a*) that detinue, considered as a tort, does not substantially differ from conversion by detention.

Detinue as a tort merely one form of conversion.

It was originally a convenient form of action, because counts in detinue might be joined with counts in contract. This advantage ceased to be peculiar when the Common Law Procedure Act of 1852 gave a very general liberty of joining different causes of action (*b*). By the Common Law Procedure Act of 1854 (*c*) the Courts acquired, for the first time, a right in actions of detinue to issue a writ ordering the return of the chattel detained, without giving the option of retaining it on payment of the value assessed. But now in all cases there is jurisdiction to order the specific restoration of property wherever special reasons exist which make damages an inadequate remedy (*d*); and in event of the defendant refusing to obey the orders of the Court (including a County Court) his person may be attached for the contempt (*e*).

Replevin.

Replevin is a summary process by which a man out of whose possession goods have been taken may obtain their return until the right to the goods can be determined by a Court of law. The procedure is now regulated by statute (*f*). The plaintiff goes before a county court registrar (*g*) and either deposits a sum as security or enters into a bond with securities conditioned to

(*a*) In *Goodman* v. *Boycott*, (1862) 2 B. & S. 1, the plaintiff sued in detinue for title deeds. The defendant pleaded that one Goodman deceased had deposited the deeds with him, that he had lost them in Goodman's lifetime, that the plaintiff's only title to them was as devisee of Goodman, and that the detention sued on was the loss in Goodman's life. Wightman, J., held the plea bad; Blackburn, J., held it good. Lord Blackburn's view turned on a mere question of pleading, and, according to *Wilkinson* v. *Verity*, it would seem that his difficulty would have been got rid of if the plaintiff had new assigned and alleged as the detention sued on a demand by him and a refusal by the defendant, or, according to *Bristol and West of England Bank* v. *Midland R. Co.*, (1891) 2 Q. B. p. 661, if the vendor to the plaintiff had been co-plaintiff. In the latter case the decision of Wightman, J., in *Goodman* v. *Boycott*, was approved, and it was held that it was no answer to the plaintiff's claim to say, "We made away with the goods before your title accrued."

For statutory right of a mortgagor to inspect deeds, see 44 & 45 Vict. c. 41, s. 16 (sub-s. 1).

(*b*) 15 & 16 Vict. c. 76, s. 41.

(*c*) 17 & 18 Vict. c. 125, s. 78.

(*d*) See *Pusey* v. *Pusey*, (1684) 2 White & Tudor, L.C. 454 (7th ed.), and *Petre* v. *Ferrers*, (1892) 65 L. T. 569.

(*e*) *Hymas* v. *Ogden*, (1905) 1 K. B. 246, C. A.

(*f*) 51 & 52 Vict. c. 43, ss. 134—137.

(*g*) As to the responsibility of registrars in taking the bond, see *Young* v. *Brompton Waterworks Co.*, (1861) 1 B. & S. 675.

commence an action of replevin within a week, to prosecute it with effect (*a*) without delay, and to make return of the goods if return thereof shall be awarded. If he succeed in his action he may recover in respect of any special damage sustained and also the value of the goods if, in fact, they have not been redelivered (*b*) to him under the process of the county court. He may also recover the expenses of the replevin bond and any special damage which he has sustained by the wrongful taking (*c*). In *Smith* v. *Enright* (*d*) it was held that such special damage may include annoyance and injury to credit and reputation in trade (*e*). If the defendant succeeds he is, at common law, entitled only to a judgment for the return of the goods (*f*). Under certain statutes now repealed the defendant was entitled to recover any special damage which he had suffered. It appears that in spite of the repeal such damage is still recoverable (*g*). The defendant has also the remedy on the replevin bond for a breach of any of its conditions.

Replevin only in case of trespass.

Replevin can only be brought when there has been a taking by trespass, whether under colour of some legal process or otherwise (*h*). In *Mennie* v. *Blake* (*i*) the plaintiff had lent a cart and horse to one Facey, who handed them over to the defendant in satisfaction of a debt. The plaintiff proceeded by replevin, but it was held that the action was not maintainable, because the possession of the defendant was peaceable (*k*).

If, however, a distrainor before impounding refuses a due tender, the owner may still replevy, because, it is said, the

(*a*) *I.e.*, to a not unsuccessful termination (*Tummons* v. *Ogle*, (1856) 6 E. & B. 571).

(*b*) An action, it would seem, lies if the person who has taken the goods disposes of them with notice of the replevin proceedings (*Mounsey* v. *Dawson*, (1837) 6 A. & E. 752).

(*c*) *Gibbs* v. *Cruikshank*, (1873) L. R. 8 C. P. 454.

(*d*) (1893) 69 L. T. N. S. 724.

(*e*) But that case appears to be opposed to *Dixon* v. *Calcraft*, (1892) 1 Q. B. pp. 464, 466, as to which see above, p. 137.

(*f*) *Gotobed* v. *Wool*, (1817) 6 M. & S. 128.

(*g*) *Smith* v. *Enright*, (1893) W. N. 173; and see Mayne on Damages, 7th ed. p. 453.

(*h*) *Shannon* v. *Shannon*, (1804) 1 Sch. & Lef. 324; *Galloway* v. *Bird*, (1827) 4 Bing. 299.

(*i*) (1856) 6 E. & B. 842.

(*k*) The Court seems to have been of opinion that the possession of the defendant was not only peaceable but lawful until the plaintiff should demand the property back. It would seem, however, that the taking was an act of conversion (see above, p. 232) though doubtless no trespass.

When it lies.

subsequent detention is equivalent to a fresh taking. The reason given is of doubtful validity (*a*). The ordinary use of replevin is in cases of distress for rent or distress *damage feasant*. It has, however, been frequently employed by parties complaining of a seizure of their goods under process of an inferior Court issued without jurisdiction (*b*); and in this way questions of rating liability have, on more than one occasion, been brought to the test (*c*).

When not.

But there can be no replevin against an execution of a superior Court (*d*), nor against a revenue seizure or distress for any Crown due (*e*).

In *Mellor* v. *Leather* (*f*) the plaintiff's property had been seized by a constable on information that the plaintiff had stolen it. It was held that, assuming the seizure to be unlawful, an action of replevin was maintainable, although an unusual form of remedy in such a case.

What kind of property can be sued for.

Money.

An action can be brought for the taking or conversion of any corporeal personal property (*g*), including papers and title deeds (*h*). It is sometimes said that current coin of the realm is an exception to this rule, and money, unless "in a bag," cannot be sued for in an action of tort. This, however, is incorrect (*i*). Of course if a man simply receives a sum to be repaid on request the property in it passes, and his only liability is for the debt, but if the undertaking is that he should return or hand over the specific coins entrusted to him and he converts them to his own use an action of trover will lie (*k*). It is an *à fortiori* case if there has been an unauthorised taking out of the actual possession of the owner; but if the coins are paid

(*a*) *Evans* v. *Elliot*, (1836) 5 A. & E. 142. See below, p. 288, note (*a*).

(*b*) *Rex* v. *Burchett*, (1722) 1 Str. 567; *George* v. *Chambers*, (1843) 11 M. & W. 149; *Allen* v. *Sharp*, (1848) 2 Ex. 352.

(*c*) *Governors of Bristol Poor* v. *Wait*, (1834) 1 A. & E. 264; *Mersey Docks & Harbour Board* v. *Cameron*, (1864–5) 11 H. L. C. 443; *Marshall* v. *Pitman*, (1833) 9 Bing. 595; *London & North Western R. Co.* v. *Buckmaster*, (1874) L. R. 10 Q. B. 70.

(*d*) *Per* Parke, B., *George* v. *Chambers*, (1843) 11 M. & W. p. 160.

(*e*) *Rex* v. *Oliver*, (1717) Bunbury, 14; *per* Eyre, C.B., *Cawthorne* v. *Campbell*, (1790) 1 Anstruther, p. 212.

(*f*) (1853) 1 E. & B. 619.

(*g*) *Allen* v. *Sharp*, (1848) 2 Ex. 352.

(*h*) *Anon.*, (1828) 1 Moll. 390, but see Bacon's Abr. tit. Replevin F.

(*i*) *Hall* v. *Dean*, (1600) Cro. Eliz. 841; *Draycot* v. *Piot*, (1601) *ibid.* 818; *Kinaston* v. *Moor*, (1627) Cro. Car. 89.

(*k*) *Orton* v. *Butler*, (1822) 5 B. & Ald. 652.

over to an innocent third party, then the property is transferred and the money cannot be followed in his hands (*a*). Whenever the facts are such that a charge of larceny, whether by a taking or as bailee, could be supported, it would seem to follow that there is also a conversion (*b*).

Negotiable instruments.

Negotiable instruments and other securities, such as guarantees and bonds, considered as corporeal property, are simply pieces of paper. Their sole value is as *choses in action*. If, however, they are unlawfully converted and detained, the person entitled may recover full damages to the extent of his loss (*c*).

Title deeds.

Although title deeds are not, properly speaking, chattels, it has always been held that they can be sued for in trover or detinue (*d*). It is said, however, that they cannot be replevied (*e*). If the plaintiff sues in trover, his damage is *primâ facie* the whole value of the estate to which they appertain (*f*).

Realty when severed.

If a portion of realty is severed and taken away the owner, instead of suing in respect of the injury to the realty, may elect to treat the severed portion as his chattel and sue for its conversion. In this way a remedy may be obtained for coal wrongfully worked, timber wrongfully cut, fixtures wrongfully removed (*g*).

American rule as to measure of damages in certain States

In certain American States it has been held, where the taking was wilful and tortious, that if subsequently to the conversion the nature of the chattel was altered (as, for example, if logs were sawn into boards, or growing wheat was harvested and threshed), the plaintiff was entitled to recover the value of the chattel in its new forms (*h*), but this principle finds no place in modern English law. But even tenant's fixtures, while they remain unsevered, are part of the realty, and therefore trover

(*a*) *Foster* v. *Green*, (1862) 7 H. & N. 881.

(*b*) See *Reg.* v. *Hassall*, (1861) 30 L. J. M. C. 175; *Reg.* v. *Aden*, (1873) 12 Cox 512; *Reg.* v. *De Banks*, (1884) 13 Q. B. D. 29. This last case seems open to some question.

(*c*) *Alsager* v. *Close*, (1842) 10 M. & W. 576; *Watson* v. *McLean*, (1858) E. B. & E. 75; *M'Leod* v. *M'Ghee*, (1841) 2 M. & G. 326: *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte, Paris*, (1894) 2 Q. B. 157. But see *Embericos* v. *Anglo-Austrian Bank*, (1904) 2 K. B. 870.

(*d*) *Plant* v. *Cotterill*, (1860) 5 H. & N. 430.

(*e*) Vin. Ab. Replevin A. 9; Bacon's Abr. tit. Replevin F., but see *Anon.*, (1828) 1 Moll. 390.

(*f*) *Per* Alderson, B., *Loosemore* v. *Radford*, (1842) 9 M. & W. p. 659.

(*g*) *Wood* v. *Morewood*, (1841) 3 Q. B. 440, note; *Berry* v. *Heard*, (1637) Cro. Car. 242; *Farrant* v. *Thompson*, (1822) 5 B. & Ald. 826.

(*h*) Sedgwick on Damages, 8th ed., vol. 2, s. 502.

cannot be brought in respect of them (*a*). There may, however, be a special action on the case if there be an interference with the exercise of the right of removal (*b*).

Plaintiff should have right of possession.

The general rule is that the right to bring an action for an injury committed in respect of a chattel belongs to him who either has the actual possession or the right of immediate possession at the time when the cause of action arises (*c*).

Title by relation.

To this rule there is an apparent but not a real exception in the case of title by relation. If the goods of a deceased person are unlawfully taken by a stranger between the time of his death and the grant of probate or letters of administration, even if the executor or the administrator had no right of possession at the time of the conversion, yet after his title is perfected it relates back to the death of the testator or intestate, and he is treated as if he had had the right of possession throughout (*d*). On the same principle a trustee in bankruptcy may sue in respect of a conversion committed between the date of the act of bankruptcy and his appointment (*e*).

Possession and property.

It was indeed frequently said that in trover a plaintiff sues in respect of his property, in trespass in respect of his possession, and this doctrine finds expression in the old forms of pleading. On this ground it has been broadly laid down that a plaintiff who makes title by relation can sue only in trover (*f*). This, however, is incorrect. A title which relates back, as has already been seen, avails to support an action of trespass, if trespass has been in fact committed (*g*). On the other hand, an action in trover does not decide any question of ownership. An owner cannot sue for a conversion unless he has also a right of possession; a mere possessor can, although he has no title beyond his possession. The use of the word "property," therefore, in respect of actions of trover, is misleading, and requires explanation.

(*a*) *Mackintosh* v. *Trotter*, (1838) 3 M. & W. 184.

(*b*) See *London & Westminster Loan & Discount Co.* v. *Drake*, (1859) 6 C. B. N. S. 798.

(*c*) *Wilbraham* v. *Snow*, (1669) 2 Wm. Saund. 47 a; *Brierly* v. *Kendall*, (1852) 17 Q. B. 937. As to reversionary interests, see below, p. 264.

(*d*) Holt, J., in *Jenkins* v. *Plombe*, (1704) 6 Mod. Repts. s. 181, case 265.

(*e*) *Garland* v. *Carlisle*, (1837) 4 Cl. & F. 693.

(*f*) *Per* Patteson, J., *Balme* v. *Hutton*, (1833) 9 Bing. p. 477.

(*g*) See above, p. 232; *Tharpe* v. *Stallwood*, (1843) 5 M. & G. 760.

The ownership of chattels is, as a general rule, absolute except in the case of title deeds, the property of which follows the nature of the land to which they belong. There may, however, be a double ownership. An undischarged bankrupt may acquire the property in goods, subject to the right of his trustee to intervene and claim them (*a*). The Crown and its grantees are the owners of wreck cast on shore if the shipowner does not assert his right within a given time (*b*); and so the lord of a manor is the owner of estrays provided they are not reclaimed (*c*). In all these cases there is a true right of property independent of any act of possession, and defeasible only by the intervention of him who has the superior right.

Finder of chattel.

The person who finds a chattel, or otherwise comes into its possession in an unauthorised manner, has in one sense a right of ownership, because he holds on his own account, and not by delegation from any one else with a superior title. He, however, may not only be evicted by the true owner, but if he loses possession he may subsequently be defeated in asserting any claim against a subsequent finder by reason of the infirmity of his title (*d*). Moreover, where chattels are discovered in private houses or upon private ground (in cases where the law of treasure trove does not apply) the fact that the finder was a trespasser, or at most a licensee, will subordinate his claim to that of the owner of the house or ground (*e*). But this rule does not apply in quasi-public places such as shops or railway stations (*f*). In these cases the right is called a special property, to distinguish it from the general or absolute property of the person who has a right against all the world.

Special and general property.

The term "special property" is, however, also employed to designate rights over chattels of a purely subordinate and

(*a*) *Fowler* v. *Down*, (1797) 1 B. & P. 44; *Morgan* v. *Knight*, (1864) 15 C. B. N. S. 669; *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262; *In re Clarke, Ex parte Beardmore*, (1894) 2 Q. B. 393. As to limitations on ownership of chattels by a bankrupt, see *Burnand, In re, Baker, Sutton & Co., Ex parte*, (1904) 2 K. B. 68, C. A.

(*b*) *Dunwich* v. *Sterry*, (1831) 1 B. & Ad. 831.

(*c*) *Per* Ashhurst, J., *Smith* v. *Miller*, (1786) 1 T. R. p. 480.

(*d*) See below, p. 270.

(*e*) *South Staffordshire Waterworks Co.* v. *Sharman*, (1896) 2 Q. B. 44; 65 L. J. Q. B. 460, at p. 462.

(*f*) *Bridges* v. *Hawkesworth*, (1851) 21 L. J. Q. B. 75.

Pledge and vendor's lien.

derivative character. A pledgee or unpaid vendor is not the owner of goods, but he has the exclusive right of possession for the time being, and he has also a power of sale which enables him to give third parties a title which he does not possess himself.

Exclusive right of possession.

A mortgagor before default, or a hirer of goods, or a man holding them under a lien, has an exclusive right of possession, but nothing more. If goods are lent to a man or deposited with him he has a mere possession; his bailor has still a right of possession, and may take the goods out of his hands at any time. In all these cases the temporary right which the owner has given is spoken of as a special property, and in this use of the term the action of trover is said to be founded on property. The result is, that in trover, as in trespass, the true question is the right of possession.

Trover depends on possession.

If the undisputed owner is in the actual possession of the chattel in question, it is of course clear that he is the only person who can make any claim for a wrong done in respect of it. Questions of difficulty arise first of all where there is no doubt about the ownership, but the owner has made over a possessory right to some one else; secondly, where the ownership itself is in dispute.

Right of possession before actual possession.

If the owner has given to some one else a possessory right, the person who has that right may bring the action, whether he has the actual possession or not. Generally such right is given accompanied by an actual transfer of custody, but this is not necessary; and a factor or agent to whom goods are consigned has a special property, in virtue of which he may sue even before they have come into his hands (*a*). The owner himself may or may not have a concurrent right of action, according to circumstances.

Exclusive right of possession apart from ownership.

1. Certain bailments give an exclusive right of possession to the bailee. If goods are let or pledged, the hirer or pledgee, as the case may be, has the exclusive custody and consequently the right of action (*b*) until the contract is determined. In such cases, therefore, the bailor has no right of possession, and cannot sue (*c*). So if goods are held subject to a lien, the owner's right

(*a*) *Morison* v. *Gray*, (1824) 2 Bing. 260.

(*b*) Best, C.J., in *Burton* v. *Hughes*, (1824) 2 Bing. 173.

(*c*) *Gordon* v. *Harper*, (1796) 7 T. R. 9.

is of necessity excluded, and the possessor is therefore the only person who can bring the action (*a*). If a chattel is mortgaged on the terms that until default it shall be lawful for the mortgagor to hold and enjoy the chattel, the mortgagee cannot maintain trespass or trover before default, since he has no present right of possession (*b*).

And it has been held that where one of the terms of a hire purchase agreement was that the hirer should keep and preserve the chattel hired from injury, the contract was one that entitled the hirer to create a lien, for such repairs, with a third party binding not only upon himself but also on the person from whom he hired it (*c*).

How lost.

The bailee, however, or other person with exclusive possession, may lose his right if he does any act altogether inconsistent with the terms on which he holds the goods; the right will then revert to the owner, who may therefore sue the wrong-doer or any one claiming under him. In *Mulliner* v. *Florence* (*d*) it was held that an innkeeper who sold certain horses over which he had a lien for the charges of a guest was guilty of a conversion. Now, however, by virtue of 41 & 42 Vict. c. 38, s. 2, an innkeeper has a statutory right to realise his security.

Vendor's lien and pledge.

The lien of an unpaid vendor stands on a different footing, for this is in truth not a mere personal right to retain possession of the goods, but a transferable property in the goods analogous to that of a pledgee. Both an unpaid vendor and a pledgee, after default made of payment by the vendee or of repayment by the pledgor, have a right of sale; but if before the exercise of this right a due tender is made, then a refusal to deliver is an act of conversion (*e*). If a pledgee sells or pledges to a third party before default made, the pledgor is not entitled from that mere fact to bring an action of trover, because he has no right of possession until he has tendered what is due upon the pledge (*f*).

(*a*) *Milgate* v. *Kebble*, (1841) 3 M. & G. 100; *Legg* v. *Evans*, (1840) 6 M. & W. 36; *Lord* v. *Price*, (1874) L. R. 9 Ex. 54.

(*b*) *Fenn* v. *Bittleston*, (1851) 7 Ex. 152. See too *Bradley* v. *Copley*, (1845) 1 C. B. 685.

(*c*) *Keene* v. *Thomas*, (1905) 1 K. B. 136.

(*d*) (1878) 3 Q. B. D. 484.

(*e*) *Bloxam* v. *Saunders*, (1825) 4 B. & C. 941; *Martindale* v. *Smith*, (1841) 1 Q. B. 389.

(*f*) *Halliday* v. *Holgate*, (1868) L. R. 3 Ex. 299; *Donald* v. *Suckling*, (1866) L. R. 1 Q. B. 585.

If, however, he makes such tender, and the pledgee thereupon fails to deliver, even though he may have received notice of the pledgor's bankruptcy (*a*), the latter can, it would seem clear, not only sue for the breach of the contract of pledge, but also for the unlawful detention of the chattel. But where there has been an equitable deposit of deeds to secure repayment of a loan, an action of detinue cannot be maintained therefor prior to payment, though tender may have been properly made and improperly refused (*b*). The right of a vendee against an unpaid vendor who sells before default stands, it is apprehended, on the same footing (*c*).

Other bailments.

Where there is a bailment otherwise than by way of a pledge, a sale by the bailee at once determines the contract, the right of possession at once reverts to the vendor, and he can treat the sale as a conversion (*d*). On a like principle the mortgagee of chattels can sue if his mortgagor unlawfully sells them, although the mortgagor is not at the time in default, and is therefore *primâ facie* entitled to exclusive possession (*e*).

Conversion or trespass by owner.

One who is entitled to exclusive possession for the time being of a chattel may maintain trespass or trover against the owner himself, for an interference with his right (*f*).

Injury to reversionary right.

The owner, even though he have no present right of possession, is not without remedy against a stranger who, by his wrongful act, has caused a loss or permanent damage of his chattel. In such a case his reversionary interest has been injured, and to the extent of the injury he can recover damages, whether caused by negligence, trespass, or conversion (*g*).

Simple bailments, owner's concurrent right of possession.

2. When there is a simple bailment of a chattel, as by loan or

(*a*) *Lawford and Lawrence, In re*, (1902) 2 K. B. 445.

(*b*) *Bank of New South Wales* v. *O'Connor*, (1889) 14 A. C. 273.

(*c*) In *Chinery* v. *Viall*, (1860) 5 H. & N. 288, the defendant was an unpaid vendor who sold before default. The vendee having subsequently offered to pay and failed to obtain delivery sued in trover, and it was held that the resale was in itself a conversion; but this apparently was on a view of the law of pledge which was afterwards declared incorrect in *Halliday* v. *Holgate*.

(*d*) *Singer Manufacturing Co.* v. *Clark*, (1880) 5 Ex. D. 37; *Cooper* v. *Willomatt*, (1845) 1 C. B. 672.

(*e*) *Bryant* v. *Wardell*, (1848) 2 Ex. 479; *Fenn* v. *Bittleston*, (1851) 7 Ex. 152.

(*f*) *Brierly* v. *Kendall*, (1852) 17 Q. B. 937; cp. *Roberts* v. *Wyatt*, (1810) 2 Taunt. 268.

(*g*) *Mears* v. *London & South Western R. Co.*, (1862) 11 C. B. N. S. 850; *Lancashire Waggon Co.* v. *Fitzhugh*, (1861) 6 H. & N. 502; *Tancred* v. *Allgood* (1859) 4 H. & N. 438.

deposit, the bailee holds merely as agent for the bailor. The one has actual possession, but the other has a right of possession and either may sue a stranger for a wrongful act (*a*). In *Manders* v. *Williams* (*b*), the plaintiff had sent certain casks of porter to a customer, on the terms that the empty casks should be returned, within six months or paid for at invoice price at the plaintiff's option. These casks were emptied by the customer and subsequently seized under an execution. It was held that the plaintiffs might maintain trover against the sheriff because directly the casks were emptied the plaintiffs had a right to demand their return, and consequently the right of possession had reverted to them at the time of the seizure.

In *Meux* v. *Great Eastern R. Co.* (*c*) a servant of the plaintiff took a ticket for a journey on the defendants' railway, and his portmanteau was accepted by the company as part of his personal luggage. It contained his livery, which was the property of the plaintiff. The livery was destroyed by an act of negligence on the part of one of the company's porters. It was held that, as the livery was rightfully upon the premises of the company, the plaintiff was entitled to recover its value, as damages for the injury caused by the tortious act of the servant of the company.

In *White* v. *Morris* (*d*), the action was brought by a mortgagee of certain chattels, which had been assigned to him upon trust to permit the mortgagors to hold the property until default of payment on demand and upon further trust to sell in case of default. Certain execution creditors of the mortgagee seized the goods before default had been made. It was held that the trust to permit the possession of the mortgagor was not inconsistent with an immediate right of possession on the part of the mortgagee, and that he might maintain an action of trespass against the creditors. Similarly, where a *cestui que trust* is in possession in accordance with the provisions of the trust instrument, the

(*a*) *Rooth* v. *Wilson*, (1817) 1 B. & Ald. 59; *Nicolls* v. *Bastard*, (1835) 2 C. M. & R. 659. As to the measure of damages where the action is brought by the bailee, see the discussion below, pp. 278–280.

(*b*) (1849) 4 Ex. 339.

(*c*) (1895) 2 Q. B. 387; and see *Marshall* v. *York, Newcastle, & Berwick R. Co.*, (1851) 11 C. B. 655.

(*d*) (1852) 11 C. B. 1015.

trustee has an immediate right of possession sufficient to enable him to bring an action for trover (*a*).

Custody of servant.

A mere servant who has custody or charge of goods on behalf of his master has not a possession in the sense now under consideration (*b*). The master has not only the right of possession, but constructively the possession itself. It is not, however, always easy to distinguish between a servant and a bailee. In *Moore* v. *Robinson* (*c*) the plaintiff was employed at weekly wages to navigate a fly-boat along a river, and himself engaged and paid an assistant. It was held that he had sufficient possession of the vessel to enable him to maintain trespass. The language of Smith, L.J., in *Meux* v. *Great Eastern R. Co.* (*d*), seems at first sight to indicate that the servant in that case had sufficient possession to entitle him to have maintained an action of tort against the company; but it is apprehended that it ought not to be understood to define the servant's rights or to mean more than that any rights which the servant had of proceeding in tort were not lost by the fact that he had entered into a contract with the company.

It is apprehended that the possession as distinct from mere custody which will entitle an agent to maintain trespass or trover, is of the same kind as the possession which will render such an agent liable if he detains a chattel against the person who is entitled to demand its delivery (*e*).

Goods under distress.

The law with regard to goods impounded under a distress stands on a peculiar footing. Although in the actual possession of the landlord or his agents they are considered as being in the custody of the law, and therefore he can maintain no action of trespass or trover if they are unlawfully removed. His remedy is by action of pound breach (*f*). The tenant, or whoever else is

(*a*) *Barker* v. *Furlong*, (1891) 2 Ch. 172.

(*b*) *Becher* v. *Great Eastern R. Co.*, (1870) L. R. 5 Q. B. 241.

(*c*) (1831) 2 B. & Ad. 817.

(*d*) (1895) 2 Q. B. 387, at p. 394. The origin of this rule that a servant has no possession of the goods placed in his custody by his master is not clear. It probably, as has been suggested (Holmes on the Common Law, pp. 227–8), dates back to the time when all servants were slaves, and inability to possess was one of the incidents of their *status*. But, whatever its origin, the existence of the rule at the present day cannot be regarded otherwise than as an anomaly.

(*e*) See above, p. 241, and Wyatt Paine on Bailments, p. 47.

(*f*) See below, pp. 316–317.

entitled to the possession of the goods, may demand them back from the parties removing them, and the refusal to return them will be evidence of a conversion; and he can apparently also sue for the taking itself, since the custody of the law is thereby at an end and the right of possession restored to him (*a*).

Title.

It has been already seen that in actions of the kind now under consideration the issue as to the property in the goods is not directly raised. Insomuch, however, as the right to possession must ultimately be derived from the owner, the question of title is very material. If the defendant can show that neither the plaintiff nor the person under whom he claims has any property in the subject-matter of the action, he must necessarily succeed.

By mere possession.

It must be borne in mind, however, that mere possession of itself *primâ facie* constitutes title, not only while the possession continues but even after it is parted with (*b*). If a man proves that he has been once in possession and no other title is shown to controvert his right, he may follow the goods wherever they are (*c*). The case of *Northam* v. *Bowden* (*d*) affords an illustration of what is meant by a possessory title. The plaintiff had excavated a heap of soil and left it with the intention of returning and searching it for ore. The defendant without right carted some away, and it was held that he was liable to the plaintiff in trover. An actual reduction into possession is generally necessary. It has been said that if a chattel is left on the premises of A. and B. finds it there the right is in B. as against A. (*e*). In the more recent case of *The South Staffordshire Water Co.* v. *Sharman* (*f*), this proposition was dissented from by Lord Russell, C.J., who held, citing with approval, Pollock and Wright on "Possession in the Common Law," that "the possession of land carries with it in general, by our law, possession of everything that is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also, and it makes no difference that the possessor is not aware of the thing's

(*a*) *Turner* v. *Ford*, (1846) 15 M. & W. 212.

(*b*) *Armory* v. *Delamirie*, (1721) 1 Stra. 505.

(*c*) *Burton* v. *Hughes*, (1824) 2 Bing. 173; *Jeffries* v. *Great Western R. Co.*, (1856) 5 El. & Bl. 802.

(*d*) (1855) 11 Ex. 70.

(*e*) *Bridges* v. *Hawkesworth*, (1851) 21 L. J. Q. B. 75.

(*f*) *South Staffordshire Waterworks Co.* v. *Sharman*, (1896) 12 Times L. R. 402; (1896) 2 Q. B. 44; 65 L. J. Q. B. 460.

existence"; or, in other words, that, in the absence of the true owner, the occupier's general power and intent to exclude unauthorised interference constitute a real *de facto* possessory right to everything upon the land, whether it has been actually reduced into possession or not.

In cases of title by mere possession it seems to be immaterial by what means possession is obtained, and it has been suggested that even a thief may maintain an action against any stranger who deprives him of his stolen property except in the due course of justice (*a*). Where, however, a plaintiff, relying on documentary evidence of property in the goods, failed to establish his claim, it was held that he could not afterwards sue on a bare possessory title (*b*).

How defeated.

If the plaintiff makes out a good *primâ facie* title by possession or otherwise, the defendant must in the first place impeach that title by showing that there is a better right in some one else. That better right may be in himself or in some person under whose authority he is acting, or under whom he claims (*c*), and in such a case he clearly has a good defence, for a man cannot be guilty of trespass or conversion in respect of goods to the possession of which he is entitled. But the title which he opposes to that of the plaintiff may be in some stranger who makes no claim on his own behalf, and of this it by no means follows that he should be allowed to avail himself. The following results appear to be established by the cases:

Jus tertii.

Goods taken from plaintiff's possession.

1. If the goods are in the possession of the plaintiff at the date of the injury it is no defence to show that the right is in some third party (*d*). And for this purpose it would seem the possession of a bailee on a simple bailment, as for custody, is to be considered as the possession of a bailor (*e*). In *Fell* v.

(*a*) *Per* Blackburn, J., *Buckley* v. *Gross*, (1863) 3 B. & S. p. 574. See, however, *per* Crompton, J., *ibid.* p. 573.

(*b*) *Sherriff* v. *Cadell*, (1798) 2 Esp. 616.

(*c*) *Blades* v. *Higgs*, (1861) 11 H. L. C. 621; *Bruce* v. *Wait*, (1837) 3 M. & W. 15; *Buckley* v. *Gross*, (1863) 3 B. & S. 566; *Rogers* v. *Lambert*, (1891) 1 Q. B. 318, C. A.

(*d*) *Jeffries* v. *Great Western R. Co.*, (1856) 5 E. & B. 802; *Bourne* v. *Fosbrooke*, (1865) 18 C. B. N. S. 515. Proof, however, that the title is in a third party may in some cases affect the measure of the damages. See this subject discussed below, pp. 278–280.

(*e*) *Bourne* v. *Fosbrooke*. (1865) 18 C. B. N. S. 515. This use of the word "possession" adds one to its many ambiguities of meaning. A man is said to be in actual possession when he has

Whittaker (*a*), the plaintiff, a tenant, had assigned to a trustee for the benefit of his wife goods upon which his landlord distrained. Though the plaintiff was neither legal nor equitable owner of the goods, it was held that his mere enjoyment of the use of them with the consent of his wife and her trustee, gave him a sufficient interest in them to entitle him to maintain an action for an excessive distress. Special property.

2. If the plaintiff has never been in possession he must recover on the strength of his title. He cannot, therefore, succeed where it is proved that there is a third party who has a better title, for the sole thing upon which he relies is thereby destroyed. In *Gadsden* v. *Barrow* (*b*) the plaintiff in an interpleader issue claimed certain goods as against an execution creditor. They had been assigned to him by the execution debtor under a bill of sale, but remained in the possession of the assignor. The creditor successfully set up a prior bill of sale by which the same goods had been assigned to a third party who made no claim. The plaintiff had clearly no title, because his grantor had previously parted with all his right (*c*). It is true that the execution creditor had no right either, but there being an equal absence of right on either side the party failed on whom the burden of proof lay. Plaintiff never in possession.

With this case may be contrasted *Morgan* v. *Knight* (*d*). The plaintiffs were the assignees in the second bankruptcy of one Knight, an uncertificated bankrupt. Knight had been allowed by the assignees in his first bankruptcy to trade on his own account.

the immediate custody or control of a chattel. He is in constructive possession when he has lost the possession and no one else has acquired it. He is also in constructive possession when his servant has the charge of it. The servant has the actual possession, but not a possession sufficient to enable him to sue. Finally, in the case under consideration the possession of a bailee is said to be the possession of the bailor.

(*a*) (1871) L. R. 7 Q. B. 120.

(*b*) (1854) 9 Ex. 514. *Edwards* v. *English*, (1857) 7 E. & B. 564, seems difficult to reconcile with this case, but here the difficulty arose not in respect of the rule of law, but in respect of the meaning to be attached to the issue; cp. *Chase* v. *Goble*, (1841) 2 M. & G. 930.

(*c*) If the grantor had an equity of redemption under the first bill of sale, he might convey an equitable title to the grantee of the second bill of sale, which the Courts would recognise in an interpleader. See *Duncan* v. *Cashen*, (1875) L. R. 10 C. P. 554; *Engelbach* v. *Nixon*, (1875) L. R. 10 C. P. 645. In *Usher* v. *Martin*, (1889) 24 Q. B. D. 272, a claimant possessed of the equity of redemption in goods was held to be entitled to them as against the execution creditor.

(*d*) (1864) 15 C. B. N. S. 669.

He acquired certain property and fraudulently assigned it to his son, the defendant. In an action brought against him the latter endeavoured to protect himself by the title of the first assignees, but it was held that he could not do so, since the plaintiffs had a property defeasible indeed at the option of the prior assignees, but available against everybody else.

Bare possession subsequently lost.

3. If one who has bare possession of a chattel altogether loses such possession and then seeks to recover it from a subsequent finder, it is apprehended that the title of the true owner can be set up against him. For since he has to show a right of possession he must rely on his title, and the title to be inferred *primâ facie* from his possession is rebutted when the true ownership is proved (*a*), such proof amounting to an eviction by title paramount (*b*).

Title lost before wrongful act.

4. If a plaintiff in trespass or trover seeks to recover on his title only, it is always permissible to show that such title had ceased before the date of the alleged wrongful act. In *Leake* v. *Loveday* (*c*), the plaintiff had let certain furniture to a man who afterwards became bankrupt, the furniture being then in his order and disposition. The assignees made at the time no claim, but an execution being subsequently put in and the furniture seized and sold, they gave notice of their title to the sheriff, who paid over to them the proceeds. The plaintiff sued him in trover. It was held that the title of the assignees must be taken to relate back to the act of bankruptcy, that consequently the plaintiff was divested of his title at the time of the execution and could not recover.

Bailor and bailee.

Estoppel.

5. A bailee is not as a general rule, in an action brought against him by the bailor in respect of the subject-matter of the bailment, entitled to set up *jus tertii*, whether the bailment be constituted by a delivery or by an acknowledgment of the bailor's title to goods in the bailee's possession (*d*). He is estopped from disputing his bailor's title. The only exception to that rule is

(*a*) This is assumed in the judgment of Erle, C.J., in *Bourne* v. *Fosbrooke*, (1865) 18 C. B. N. S. 515, for otherwise it would not have been necessary to argue that there was a continuance of possession.

(*b*) See par. 5, *infra*.

(*c*) (1842) 4 M. & G. 972. See, too, *Richards* v. *Jenkins*, (1886) 17 Q. B. D. 544; (1887) 18 Q. B. D. 451, C. A.

(*d*) *White* v. *Mullet*, (1851) 6 Ex. 713; *Hawes* v. *Watson*, (1824) 2 B. & C. 540.

where the bailee has been evicted by title paramount; that is to say, has had the subject-matter forcibly taken from him by the true owner (*a*), or, having had an adverse claim made against him by the true owner, he has acknowledged the owner's title, and defends the action brought by the bailor under the title and by the authority of the owner (*b*). It was, indeed, formerly thought that the estoppel only applied to a case in which the bailee sought to set up that the bailor had no title at the date of the bailment, and that he was not precluded from showing that the title had determined since that date (*c*). But it is now settled otherwise. The bailee equally cannot be heard to say that the bailor had no title either at the commencement of the bailment or at any subsequent date, unless he defends by the owner's authority (*d*).

Bailee may be absolutely bound by contract.

The above exception does not necessarily apply in every case, because the liability of the bailee depends upon his contract, and it may be that he has bound himself to return the property in all events, or else has been in some way responsible for the loss of the goods, in either of which cases a plea of eviction by title paramount, even when justified, will constitute no bar to the bailor recovering damages (*e*). Moreover, should he receive the bailment with full notice of the defect in the bailor's title, and consequently of his liability to be sued by a third party, it would seem that, having voluntarily taken this risk on himself, he ought not to be permitted to relieve himself of it by attorning to the true owner (*f*).

Estoppel personal.

The estoppel is merely personal to the bailee, and does not necessarily bind the goods. If, for example, an execution creditor seizes goods held under a bailment, the bailor must recover on

(*a*) *Shelbury* v. *Scotsford*, (1603) Yelv. 22.

(*b*) *Biddle* v. *Bond*, (1865) 6 B. & S. 225; *Betteley* v. *Reed*, (1843) 4 Q. B. 511. However, in *Cheesman* v. *Exall*, (1851) 6 Ex. 341, the bailee was allowed to set up against his bailor the paramount title of a third party, who, as far as appears, made no claim. This element in the case does not seem to have been considered. The bailment was made for the very purpose of fraudulently defeating the right of the owner, and, therefore, the defendant might well be entitled to succeed on the ground that he and the plaintiff were *in pari delicto*.

(*c*) *Philips* v. *Robinson*, (1826) 4 Bing. 106; *Thorne* v. *Tilbury*, (1858) 3 H. & N. 534.

(*d*) *Rogers & Co.* v. *Lambert*, (1891) 1 Q. B. 318.

(*e*) *Ross* v. *Edwards*, (1895) 11 Repts. 574, P. C.; 73 L. T. 100, P. C.

(*f*) See *per* Jessel, M.R., *Ex parte Davies*, (1882) 19 Ch. D. p. 90.

the strength of his title, being out of possession (*a*), and the creditor may set up any better title against him (*b*). And even where the bailor's ultimate title prevails, if, by reason of any agreement, he is divested of the right to the immediate possession of the chattel, it is apprehended that the creditor is entitled to the entire beneficial interest, if any, of the bailor therein, subject to the superior rights of any other party interested. Thus, if a life tenant pledge heirlooms, and the pledgee on default realised his security, the purchaser is probably entitled to the possession of the chattels during the life of the pledgor, although upon his decease he may be bound to hand them over to the reversioner (*c*).

Goods "on sale or return."

Where, however, a wholesale dealer sent goods to a retail trader "on sale or return," upon a condition that the goods should remain the property of the wholesale dealer until they were paid for or charged, and the retail trader fraudulently pledged the goods to a third party, it was held that the wholesale dealer was entitled to repudiate the transaction, and recover the goods from the pledgee, mere parting with the possession of chattels without the property passing raising no estoppel (*d*).

Who may sue for severed realty.

It has been already seen that, if realty is severed and carried away, the person entitled, instead of suing for the trespass to the realty, may treat the severed property as a chattel and bring an action of trespass or trover in respect of its removal. The right to bring this action does not necessarily belong to the person who was in possession of the property at the time of the severance,

Trees.

but to the person in whom it vests on severance. Thus, if timber is cut or uprooted it is, in all cases, the property of him who has the first estate of inheritance without impeachment of waste in the land on which it grew (*e*). But trees which are not timber belong on severance to the occupier (*f*).

If a house subject to a demise is blown down by a storm, the lessee has still a special property in the materials to build it up

(*a*) Except in such cases as *Bourne* v. *Fosbrooke*, see above, p. 268.

(*b*) *Richards* v. *Jenkins*, (1886) 17 Q. B. D. 544; (1887) 18 Q. B. D. 451.

(*c*) *Studdert* v. *West*, (1902) L. T. Feb. 15, 1902, p. 353.

(*d*) *Weiner* v. *Gill*, (1905) 2 K. B. 172; but see *Bryce* v. *Ehrmann*, (1904) 42 Sco. L. R. 23.

(*e*) *Berry* v. *Heard*, (1637) Cro. Car. 242; *Pyne* v. *Dor*, (1785) 1 T. R. 55.

(*f*) *Channon* v. *Patch*, (1826) 5 B. & C. 897.

again (*a*). But if he unlawfully pulls it down, it would seem that the right of possession at once passes to the landlord (*b*). If a tenant unlawfully severs fixtures the landlord may recover either against him or any person who subsequently detains them, because the tenant's own wrongful act has determined his right to their enjoyment (*c*). But if the severance is by the act of God or the act of a stranger there seems no reason in such a case why the tenant should lose all right of property (*d*).

Fixtures.

The damages to which a plaintiff, who has been deprived of his goods, is entitled, are *primâ facie* the value of the goods, together with any special loss which he may have incurred in consequence of the wrong, although in one case it was held that, under such circumstances, the measure of damages was no more than the "breaking up" or auction price of the fixtures (*e*).

Damages for deprivation of goods.

And where there has been a mere trespass unaccompanied by any deprivation of possession he cannot, of course, recover more in respect of the goods themselves than the loss which he has suffered by their diminution in value. But, as has already been seen in case of trespass, the tribunal may give general damages, having regard to all the circumstances of the case (*f*).

Trespass without deprivation.

Where the value has fluctuated it must be taken as it stood at the time of the wrongful act (*g*).

Value at time of wrongful act to be taken.

(*a*) *Herlakenden's case*, (1588) 4 Rep. p. 63 a.

(*b*) *Per* Holroyd, J., *Farrant* v. *Thompson*, (1822) 5 B. & Ald. p. 829.

(*c*) *Farrant* v. *Thompson*, (1822) 5 B. & Ald. 827.

(*d*) Some of the judges in *Farrant* v. *Thompson* (*supra*) express themselves to the effect that fixtures, like trees, in all cases of severance at once vest in the owner of the fee. This, however, is contrary to the resolution in *Herlakenden's case*.

(*e*) *Barff* v. *Probyn*, (1895) 73 L. T. 119.

(*f*) See above, pp. 135–136.

(*g*) In *Greening* v. *Wilkinson*, (1825) 1 C. & P. 625, where the cotton which formed the subject-matter of an action of trover rose in value between the date of the conversion and that of the trial, Abbott, C.J., held that the jury in estimating the damages were not limited to the mere value of the property at the time of the conversion, but were at liberty to find as damages the value at a subsequent time at their discretion. There does not appear to be any reported case in which *Greening* v. *Wilkinson* has been either questioned or followed, but it has been frequently laid down, and the rule now appears to be established, that the proper measure of damages is the market value of the goods at the time of the conversion. See *Falk* v. *Fletcher*, (1865) 18 C. B. N. S. 403; *Johnson* v. *Lancashire & Yorkshire R. Co.*, (1878) 3 C. P. D. 499; *Henderson & Co.* v. *Williams*, (1895) 1 Q. B. 521; *Rhodes* v. *Moules*, (1895) 1 Ch. p. 254; though in none of those cases was the question of fluctuation in value raised. The statute, 3 & 4 Will. IV. c. 42, proceeds upon the

How estimated.

In one case where goods had been wrongfully sold in the course of a voyage, the owner obtained as damages the cost price of the goods and the freight (*a*). In another, under similar circumstances, he obtained the amount he would have realised at the port of destination, less freight (*b*). And in another action, for breach of contract, it was decided that, in order to recover "consequential" damages, it is not always necessary to prove the exact amount actually lost, if it can be shown that a proper delivery of the chattels on a former occasion resulted in a substantial profit (*c*).

In yet another case in which the defendant had undertaken to supply a pure article of a well-known description, but in breach of agreement had supplied the article in an adulterated and poisonous condition, it was held that the measure of damages to which the plaintiffs were entitled was the price paid by them for the impure article, together with the value of the goods spoiled by admixture with the adulterated substitute (*d*).

Sometimes the price which the defendant himself realised has been given, and where the assignees of a bankrupt sued a sheriff for a sale under a wrongful execution the defendant was allowed the expenses of the sale on the ground that the assignees themselves would have been compelled to incur similar expenses in order to realise the estate (*e*). But a like allowance ought not to be made where no sale was contemplated by the plaintiff (*f*). In *France* v. *Gaudet* (*g*) the plaintiff had made a specially advantageous bargain for the sale of certain wine, which the defendant subsequently converted. The plaintiff being unable to complete his contract, owing to the fact that no wine of the like quality was procurable in the market, was allowed as damages

assumption that such is the rule, when it empowers the jury (s. 29) to give "damages in the nature of interest over and above *the value of the goods at the time of the conversion* or seizure in all actions of trover or trespass *de bonis asportatis*."

(*a*) *Ewbank* v. *Nutting*, (1849) 7 C. B. 797.

(*b*) *Burmah Trading Corporation* v. *Mirza Mohamed Ally Sherazee*, (1878) L. R. 5 Ind. App. 130.

(*c*) *Simpson* v. *London & North Western R. Co.*, (1876) 1 Q. B. D. 274.

(*d*) *Bostock & Co.* v. *Nicholson & Sons*, (1904) 1 K. B. 725. And as to measure of damages, see *The Greta Holme* (1896) P. 192, C. A.

(*e*) *Clarke* v. *Nicholson*, (1835) 1 C. M. & R. 724; *Whitmore* v. *Black*, (1844) 13 M. & W. 507.

(*f*) *Glasspoole* v. *Young*, (1829) 9 B & C. 696.

(*g*) (1871) L. R. 6 Q. B. 199.

the whole sum which he would have received from the purchaser. In all these cases, however, there has been no dispute about the principle. They simply afford illustrations of the various kinds of evidence which a jury may be permitted to take into consideration.

Work and labour subsequently expended on chattel.

The damages being fixed at the date of the wrongful act, a plaintiff cannot take advantage of any increased value given to the chattel by work and labour subsequently expended upon it. In *Reid* v. *Fairbanks* (*a*) the defendant had converted a half-built ship belonging to the plaintiffs and afterwards completed her. It was held that the measure of damage was the value of the vessel in its unfinished condition. On the same principle, if a portion of realty is severed and the party entitled elects to sue for it as a chattel, he can at most recover only its value when first severed. He cannot, for instance, when coal has been unlawfully taken, recover its value at the pit's mouth, but only at the bottom of the mine (*b*). He must deduct the expense of raising though not of winning (*c*).

Severed realty.

Fixtures.

Where fixtures wrongfully severed are sued for as chattels the measure of damage is their value as such, and not the damage to the realty (*d*).

Securities for money.

The measure of damages for depriving the plaintiff of a security for money is its value at the time of the wrongful act. In the absence of anything to the contrary, it may be taken that the security is a good one and worth the whole amount which the plaintiff might have been entitled to receive on it from the parties liable, and obviously a defendant cannot be permitted to avail himself of any diminution of value which it may have suffered through his own wrongful conduct (*e*). If, however, owing to the insolvency of the parties, or for any other reason, the security is depreciated, it would of course be unjust for the plaintiff to recover full nominal value (*f*). Where there is a market a jury

(*a*) (1853) 13 C. B. 692.

(*b*) As to law in certain American States, see *ante*, p. 259.

(*c*) See below, p. 358.

(*d*) *Clarke* v. *Holford*, (1848) 2 C. & K. 540; *Barff* v. *Probyn*, (1895) 73 L. T. 119.

(*e*) *Delegal* v. *Naylor*, (1831) 7 Bing 460; *M'Leod* v. *M'Ghee*, (1841) 2 M. & G. 326; *Alsager* v. *Close*, (1842) 10 M. & W. 576.

(*f*) See Sedgwick on Damages, 7th ed. vol. 2, pp. 465–6; *Delegal* v. *Naylor*, *supra*.

would probably give damages according to the current quotation at the time of the cause of action. It is no evidence of the value of a security in fact worthless, that money, either by mistake or otherwise, has in fact been paid upon it (*a*). It is submitted, however, that the general proposition stated above must be taken with this reservation; that where the defendant is in a fiduciary position towards the plaintiff, as, for instance, a stockbroker in regard to his client, the measure of damages for a tort, when there is no laches on the part of the plaintiff, would be the highest price of the security between the date of the wrongful act and the time of bringing the action (*b*).

Title deeds.

In respect of the loss of title deeds a plaintiff is entitled *primâ facie* to recover the value of the estate which they represent (*c*), the damages being, of course, reducible to a nominal sum on their return. What is the measure of damage where it is out of the power of the defendant to make return, does not appear. It is said that if he has destroyed the deeds he is still liable for the full value of the property (*d*). But no right of action prior to redemption accrues to a plaintiff in case of the loss of, or damage to, title deeds deposited as equitable security to cover an advance (*e*). Nor is there apparently, apart from special contract, any covenant on the part of a mortgagee to take care of title deeds during the continuance of the security (*f*), although the statutory right of a mortgagor to inspect his title deeds (*g*) may, by implication, be construed as raising a duty on the part of the mortgagee to exercise reasonable care in their custody; and the wilful or negligent destruction of deeds by a defendant entitles the plaintiff to recover damages commensurate with his loss (*h*).

Presumption of value against wrong-doer.

Where there is a doubt about the value of a chattel which has passed wrongfully into the possession of a defendant, he must either produce it or account for its non-production, otherwise it

(*a*) *Mathew* v. *Sherwell*, (1810) 2 Taunt. 439; *Wills* v. *Wells*, (1818) 8 Taunt. 264.

(*b*) *Michael* v. *Hart*, (1901) 2 K. B. 867.

(*c*) *Per* Alderson, B., *Loosemore* v. *Radford*, (1842) 9 M. & W. p. 659.

(*d*) *Per Cur. Williams* v. *Archer*, (1847) 5 C. B. pp. 327-9.

(*e*) *Gilligan* v. *National Bank*, (1901) 2 Ir. R. 518.

(*f*) S. C.

(*g*) 44 & 45 Vict. c. 41, s. 16 (sub-s. 1).

(*h*) *Hornby* v. *Matcham*, (1848) 16 Sim. 325.

will be assumed against him that it was of the highest possible value (*a*).

Special damage.

Where the circumstances are such that a defendant must be aware that the chattel converted by him is required for some particular purpose, he may be liable to pay special damage in respect of the failure of that purpose. Thus, where a carpenter lost his employment through having his tools taken from him, it was held that he might recover damages for the loss of the employment as well as the loss of the tools (*b*). So on a claim for the wrongful detention of stock which the plaintiffs had intended to sell, but were prevented from selling by the act of the defendants, substantial damages on account of the fall in the stock were recovered (*c*). But the mere capacity for profitable use is part of the value of a chattel, and therefore the loss of such use is not a separate head of damage, for if so the plaintiff would, *pro tanto*, recover twice over (*d*). A jury may, however, if they think fit, give damages in the nature of interest on the value of the goods from the date of the wrongful act (*e*).

Interest.

Where chattel returned.

If property fluctuating in value is returned, damages to the amount of its fall in value may be recovered. This really only gives effect to the general rule that the measure of damage is fixed at the time of the wrongful act (*f*).

Damages where plaintiff relies on title only.

If the plaintiff relies simply upon a right of possession depending on his property he can recover only according to the amount of his interest. Therefore, if one of several co-owners of a chattel sues for its conversion, his damages will be an aliquot share of the total value (*g*). But where several owners in common of a chattel concur in a delivery of it to a third party, no action in detinue will lie against the latter when the joint owners differ amongst themselves respecting its re- or non-delivery (*h*).

(*a*) *Armory* v. *Delamirie*, (1721) 1 Stra. 505.

(*b*) *Bodley* v. *Reynolds*, (1846) 8 Q. B. 779; explained *France* v. *Gaudet*, (1871) L. R. 6 Q. B. 199.

(*c*) *Williams* v. *Peel River Land & Mineral Co., Limited*, (1886) 55 L. T. N. S. 689; and see *Michael* v. *Hart*, (1901) 2 K. B. 867.

(*d*) *Reid* v. *Fairbanks*, (1853) 13 C. B. 692.

(*e*) 3 & 4 Will. IV. c. 42, s. 29.

(*f*) *Williams* v. *Archer*, (1847) 5 C. B. 318.

(*g*) *Bloxam* v. *Hubbard*, (1804) 5 East, 407.

(*h*) *Attwood* v. *Ernest*, (1853) 22 L. J. C. P. 225.

Where he relies on possession.

If the plaintiff relies upon his actual possession, and the action is against a stranger, the generally received view is that he is entitled to recover exactly the same measure of damages as if he were the absolute owner, upon the ground that a wrong-doer is not to be heard to deny the title of the injured party. And this view has been generally regarded as equally applicable whether the plaintiff obtained his possession by finding, wrong-doing, or bailment. As regards the two former kinds of possession, the received view is scarcely open to question, for to hold otherwise would be "an invitation to all the world to scramble for the possession" (*a*). Whilst in the third form of possession mentioned above, that of a bailee, a similar rule has at last been conclusively arrived at, after many vicissitudes of high judicial and juridical opinion, the law upon the subject being crystallised by the decision of the Court of Appeal in the case of *The Winkfield* (*b*), in which it was held that "possession with an assertion of title, or *even possession alone* (which in the case of a bailee), gives the possessor such a property as will enable him to maintain action against a wrong-doer; for possession is *primâ facie* evidence of property" (*c*).

Action by bailee.

The Winkfield.

Nor is this right of action limited to the amount of the liability over of a bailee to his bailor, the right being innate and incidental to the possession, and not to the liability over. Consequently as against a wrong-doer the right of a bailee gives him a complete title to recover the full value of the chattel, although as between himself and his bailor, to whom he stands in a fiduciary position, the right carries with it the correlative duty on his part to account to the true owner of the chattel for

(*a*) *Per* Lord Kenyon, *Webb* v. *Fox*, (1797) 7 T. R. p. 397. In the case of finders and wrong-doers, the allowance of a right to recover full damages presents great difficulty; for if after such damages have been recovered the true owner appears and sues the defendant, the latter will have to pay over again, and may be unable to recover back from the first plaintiff the damages which he had been compelled to pay him (*Marriot* v. *Hampton*) (1797) 7 T. R. 269). Moreover, in the action for recovery of possession of land, which seems to correspond more or less precisely with that of trover for chattels, the weight of authority is to the effect that where the true owner can be shown his title may be set up in answer (see below, p. 360), and it is difficult to see why land and chattels should stand in a different position in this respect.

(*b*) (1902) P. D. 42, C. A.; and see *Glenwood Lumber Co.* v. *Phillips*, (1904 A. C. 405 P. C.

(*c*) 2 Wms. Saunders, 47 f,

its full value, or such proportion of its full value as he may himself have derived from the tort-feasor. Nor does the fact that bailor as well as a bailee has a right of action against a wrong-doer logically detract from that innate right to demand compensation for a tort which follows as a necessary corollary to the right to legal possession. *The Winkfield.*

The fact that damages, amounting to satisfaction in full, have been recovered by the bailor or by the bailee, does not do away with that right of action which is innate to the one by reason of his ultimate title to the goods, and to the other by reason of his legal possession; it merely acts as an estoppel to further action against the defendant in respect of that particular tort for which the damages have been recovered, upon the well-known principle of law *Nemo debet bis vexari, pro una et eadem causa*, although where "both the bailee and the bailor have suffered damage by the wrongful act of a third party each may bring a separate action for the loss suffered by himself" (*a*).

Up to the date of the decision in *The Winkfield* it must be conceded that the rulings in the various cases which have arisen on this particular point are quite irreconcilable.

For, though the consensus of opinion of both the judges and the text-books is in favour of the ultimate decision arived at by the Court of Appeal, in the comparatively recent case of *Claridge* v. *South Staffordshire Tramway Co.* (already referred to), an exactly opposite decision was given by the Court, and leave to appeal refused; it being held in this case that the plaintiff, who was bailee of a horse which was injured while in his possession by the negligence of the defendants, could only recover nominal damages, he being under no liability to his bailor for the injury done to the chattel whilst in his custody.

O. W. Holmes, jun., in his very learned disquisition on "The Common Law" (*b*), attributes the principle underlying the right of the bailee to sue a tort-feasor for the conversion of, or for damage to, a chattel in his possession, to an early Germanic

(*a*) *Claridge* v. *South Staffordshire Tramway Co.*, (1892) 1 Q. B., Hawkins, J., at p. 424. As to the measure of damages recoverable, see *The Greta Holme*, (1896) P. 192, C. A.

(*b*) Lecture V., "Bailment."

origin, considerably antedating the bailee's claim to recover to that subsequently allowed to the bailor.

Whether this statement can be substantiated or no, there can be little doubt that from very early times legal possession of a chattel has been held to carry with it, as an inherent right, all legal remedies pertaining to complete dominion. Consequently the view arrived at by the Court of Appeal in the case of *The Winkfield* possesses the sanctions of high antiquity as well as those of modern expediency.

Between parties both having an interest.

When the action is between persons both having an interest in the chattel, as, for example, between bailor and bailee, then the measure of damages is the injury actually sustained, and limited, therefore, to the amount of the plaintiff's interest.

Between mortgagor and mortgagee.

Thus, in *Brierley* v. *Kendall* (*a*), the plaintiff had assigned to the defendants certain chattels under a bill of sale which gave him exclusive right of possession until default. The defendant seized before default, and it was held that the plaintiff could recover only what his right of possession against the defendant was worth.

Between pledgor and pledgee.

Johnson v. *Steer* (*b*) was a converse case, being an action by the owner against the pledgee who was held to have unlawfully parted with the goods pledged. The plaintiff recovered only nominal damages, the property having been pledged for its full value.

Between vendee and vendor.

On the same principle an unpaid vendor who, having sold goods on credit, resold them before the term of credit expired, was held to be liable only to the extent of the difference between the money due under the contract and the value of the goods at the time of the resale (*c*).

Where vendor retakes goods.

But where a vendor had parted with the goods to the vendee and afterwards being unpaid retook possession, it was held that he was liable to the vendee for the whole value without deduction, the law regarding with disfavour a principle that would admit of a party setting off a debt due in one case against damages in another, though, on the other hand, the vendee was held liable for the price of the goods in a cross action (*d*).

(*a*) (1852) 17 Q. B. 937; 21 L. J. Q. B. 161.

(*b*) (1863) 15 C. B. N. S. 330.

(*c*) *Chinery* v. *Viall*, (1860) 5 H. & N. 288. As to whether in this case, and *Johnson* v. *Steer*, it was correctly held that there was a conversion, see above, p. 264, note (*c*).

(*d*) *Gillard* v. *Brittan*, (1841) 8 M. & W. 575. See too *Johnson* v.

Lien.

In the case of an ordinary lien there is no right in the holder of the goods who converts them to deduct, in an action at the suit of the owner, the amount for which he had the lien from the value of the goods. The right is purely personal and is altogether forfeited by the unlawful act (*a*).

Return of chattel.

When a chattel has been wrongfully taken, detained or otherwise converted, there is a vested cause of action which cannot be defeated merely by the fact that the plaintiff subsequently gets his goods again. But after such redelivery the action is merely for the special damage or deterioration in value, failing which the plaintiff, though he recover nominal damages, is considered in effect as a defeated party and may be made to pay costs (*b*). The position is the same if the plaintiff, after action brought, thinks proper to take the chattel back (*c*). The Court has besides power to stay any action on delivery of the chattel and payment of costs, if the circumstances are such as to show that the plaintiff thereby clearly obtains the full redress to which he is entitled (*d*). If the plaintiff obtains a verdict for the value of the chattel it is common to provide that it shall be reduced to a nominal sum on return being made. But this is simply a matter of arrangement between the parties (*e*). Even though no such provision is made, yet if, in fact, the plaintiff gets his property back again, the Court will treat this as *pro tanto* a satisfaction and reduce the verdict accordingly (*f*). And upon a similar principle if part of the chattels in question are given up the action may be stayed in part (*g*), provided the bulk is severable without diminution of value (*h*).

Transaction equivalent to return.

In some cases a transaction by which the plaintiff got the

Lancashire & Yorkshire R. Co., (1878) 3 C. P. D. 499.

(*a*) *Mulliner* v. *Florence*, (1878) 3 Q. B. D. 484. For two exceptional cases in which on moral grounds the plaintiff was refused the full value of his goods, see *Du Bost* v. *Beresford*, (1810) 2 Camp. 511; *Cameron* v. *Wynch*, (1846) 2 C. & K. 264; and see 41 & 42 Vict. c. 38, s. 2.

(*b*) *Hiort* v. *London & North Western R. Co.*, (1879) 4 Ex. D. 188.

(*c*) *Moon* v. *Raphael*, (1835) 2 Bing. N. C. 310.

(*d*) *Fisher* v. *Prince*, (1762) 3 Burr. 1363; *Pickering* v. *Truste*, (1796) 7 T. R. 53; *Tucker* v. *Wright*, (1826) 3 Bing. 601.

(*e*) *M'Leod* v. *M'Ghee*, (1841) 2 M. & G. p. 328, note (*a*).

(*f*) *Plevin* v. *Henshall*, (1833) 10 Bing. 24.

(*g*) *Earle* v. *Holderness*, (1828) 4 Bing. 462.

(*h*) *Bunney* v. *Poyntz.*, (1832) 4 B. & Ad. 568.

benefit of the property, though it never came back into his hands, has been treated as equivalent to a redelivery. In *Hiort* v. *London & North Western R. Co.* (*a*), the defendants held certain corn as warehousemen, deliverable to the plaintiff's order. They improperly delivered it to one G. The plaintiff afterwards sold the same corn and made out a delivery order to the purchaser. It was indorsed by him to G., and by G. handed to the defendants. The Court pointed out that the plaintiff had not been damnified, because he had an action for the price against his purchaser, and they held that what had occurred was the same thing as if the defendants had got back the corn from G. and afterwards delivered it under the plaintiff's order. In *Plevin* v. *Henshall* (*b*) the plaintiff had obtained a verdict in trover against the defendant. The goods in question in the action were lying in a house for the rent of which the plaintiff was liable, and the landlord distrained upon them. The verdict was reduced by the amount of the distress, it being held that the parties were in the same situation as if, after verdict, the defendant had gone and paid the plaintiff the sum in question. Otherwise the plaintiff would have had the benefit of the goods twice over, while the defendant, without getting the goods, would have paid their full value. But in *Edmonson* v. *Nuttall* (*c*) the defendant unlawfully detained certain chattels of the plaintiff, and afterwards caused them to be taken in execution and sold in satisfaction of a judgment which he had against the plaintiff. It was contended that only nominal damages could be recovered, since the proceeds of the goods had been applied to the benefit of the plaintiff. The Court, however, held that a creditor could not be permitted in this way to take advantage of his own wrongful act, and gave the plaintiff the full value. They pointed out that the defendant suffered no injustice, because he was remitted to his original right on his judgment (*d*).

Successive conversions.

It may not unfrequently happen that the owner of a chattel who has wrongfully been deprived of his possession may have a remedy against more than one person. A. may have wrongfully taken it,

(*a*) *Supra*, p. 281.
(*b*) *Supra*, p. 281.
(*c*) (1864) 17 C. B. N. S. 280.
(*d*) The judgments could be set off against each other, and therefore the question was really one of costs.

and B. may afterwards have wrongfully detained it. A. and B. are not joint tort-feasors; there is a perfectly independent right of action against each (*a*). It has been suggested that in an action against one of these wrongdoers a jury may take into consideration the fact that the plaintiff can also have recourse to the other (*b*). This suggestion, however, has not been subsequently acted upon, and seems contrary to principle. Nor does a waiver of tort against one wrong-doer, when coupled with a reservation of rights against others, constitute so conclusive a waiver of the original wrong by the plaintiff as to debar him from proceeding against the remaining tort-feasors (*c*). But if judgment is obtained and satisfied for the full value of a chattel, the property is thereby changed as from the date of the wrongful act, and the plaintiff will consequently lose all right of action against any subsequent wrong-doer (*d*). He might still, however, it would seem be entitled to nominal damages in respect of anything done previously.

Effect of satisfied judgment.

Recovery of less than the full value does not transmute the property or affect any other right of action (*e*), but it cannot be doubted that no plaintiff will be allowed to recover twice over, and therefore any damages which he may have actually received in one action will have to be taken into consideration in the other (*f*).

Part satisfaction.

(*a*) *Winter* v. *Bancks*, (1901) 81 L. T. 504.

(*b*) See *Morris* v. *Robinson*, (1824) 3 B. & C. pp. 205–6.

(*c*) *Rice* v. *Reed*, (1900) 1 Q. B. 54, C. A.

(*d*) *Brinsmead* v. *Harrison*, (1871) L. R. 6 C. P. 584.

(*e*) *Morris* v. *Robinson*, (1824) 3 B. & C. 196; see note *Holmes* v. *Wilson*, (1839) 10 A. & E. p. 511.

(*f*) "If, indeed, the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them having double satisfaction." *Per* Bailey, J., *Morris* v. *Robinson*, 3 B. & C., at p. 205; and see *The Winkfield*, (1902) P. D., Collins, M.R., pp. 60, 61.

CHAPTER XII.

DISTRESS.

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Distress, what it is.

DISTRESS is a remedy given by the common law, whereby a party in certain cases is entitled to enforce a right or obtain redress for a wrong in a summary manner, by seizing chattels and retaining them as a pledge until satisfaction is obtained.

Distress for rent.

The most important head of distress is for rent, whether it be the return due from the tenant holding the land to the lord of whom it is held, or an annual sum charged on the land in favour of a person who, apart from such rent, has nothing further in the

Rent-charges.

land. Rents of the latter kind were known as rent-charges or rents seck, according as the power of distress was incident to them or not, but now by statute the distinction is abolished, and all such rents may be distrained for as rents reserved on lease (*a*.). It has been said that neither a rent-charge nor a rent-seck can be created by a person having an interest less than freehold (*b*).

Rent-service.

The former kind is known as rent-service. It includes ancient quit rents created before the statute of *Quia Emptores*, copyhold rents, rents payable in respect of enfranchised copyholds (*c*), and rents incident to a reversion, or, which is practically the same thing, rents reserved by lease. With regard to this kind of rent, it is impossible here to deal at large with the law of landlord and

(*a*) 4 Geo. II. c. 28, s. 5. See too 44 & 45 Vict. c. 41, s. 44.

(*b*) —— v. *Cooper*, (1768) 2 Wils. 375; followed *Langford* v. *Selmes*, (1857) 3 K. & J. 220. See, however, *Butt's case*, (1600) 7 Rep. 23a.

(*c*) 6 & 7 Vict. c. 23, s. 2. That rent, however, is spoken of throughout the Copyhold Acts as a rent-charge. As to tithe rent-charge, see 6 & 7 Will. IV. c. 71, s. 81, and 54 Vict. c. 8, ss. 1 and 2.

tenant; it is enough to say for the right of distress to exist there must in the first place be an actual occupation of land by the tenant, not a mere incorporeal right in the land (*a*); there must be a certain rent—the consideration for the use of the land in money, kind or actual service (*b*) must be ascertained by the terms of the demise itself, or ascertainable on some definite principle, as in the case of royalties (*c*); and finally the relation of landlord and tenant must exist in the full sense of the term at the time of the distress. Mere use and occupation, or a tenancy on sufferance, can give no right to distrain; there must be at the very least a tenancy at will (*d*). But an express power in a mining lease for a landlord to distrain for rent in arrear on chattels belonging to his tenant situated in mines adjacent to that actually demised has been decided by the Court of Appeal to confer a right of distress on the chattels in such neighbouring mines, provided the workings in the adjacent properties are on the same seam of coal as that in the mine demised, with which therefore they might be connected underground (*e*). A receiver appointed by the Court may distrain, but if the tenant has not attorned to him it must be in the name of the person who has the legal estate (*f*). But if a lessee with an original lease and a reversionary lease, or an agreement therefor, sub-lets the premises for a term exceeding the original demise, he cannot distrain for rent during the currency of the original lease either at common law or by statute (*g*). In the case where a man entered under an instrument void as a lease, because not in accordance with statutory requirements, it was formerly clear that until he paid rent no tenancy existed, and therefore no right of distress (*h*). It is said now, however, that mere entry under an agreement for a lease of which specific

(*a*) *Hancock* v. *Austin*, (1863) 14 C. B. N. S. 634; and cp. *Selby* v. *Greaves*, (1868) L. R. 3 C. P. 594.

(*b*) For a modern case of a tenancy by actual service, see *Doe* v. *Benham*, (1845) 7 Q. B. 976.

(*c*) *Daniel* v. *Gracie*, (1844) 6 Q. B. 145; *Selby* v. *Greaves*, *supra*.

(*d*) *Williams* v. *Stiven*, (1846) 9 Q. B. 14; *Anderson* v. *Midland R. Co.*, (1861), 3 E. & E. 614; *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

(*e*) *Roundwood Colliery Co., In re*, *Lee* v. *Roundwood Colliery Co.*, (1897) 1 Ch. 373, C. A.

(*f*) *Hughes* v. *Hughes*, (1790) 3 Bro. C. C. 87; 1 Ves. jun. 161; *Bennett* v. *Robins*, (1832) 5 C. & P. 379.

(*g*) *Lewis* v. *Baker*, (1905) 1 Ch. 46.

(*h*) *Hegan* v. *Johnson*, (1809) 2 Taunt. 148; *Dunk* v. *Hunter*, (1822) 5 B. & Ald. 322.

performance may be claimed creates of itself a legal tenancy (*a*). If a tenant holds over after the termination of his lease, with no recognition on the part of his landlord beyond bare sufferance, rent due under the lease at common law cannot be distrained for, because there is no longer a real tenancy (*b*). But by statute (*c*) the landlord may distrain during a period of six months subsequent to the lease, provided his title and the possession of the tenant both continue (*d*). If an agricultural tenant has a right under his lease to occupy part of the premises for harvesting purposes after the date of quitting, this is a continuation of the term, and not a tenancy on sufferance (*e*). It would seem that the statute does not apply where the landlord on a forfeiture has made a formal entry or brought ejectment (*f*).

Distress by agreement.

Although only rent, strictly speaking, can be distrained for, yet by the agreement of the parties there may be a right of distress as for rent in respect of any due. For example, a mortgagor in possession, without attorning to the mortgagee, can covenant with him that he may distrain for interest (*g*). But of course such a contract cannot affect the rights of those who are strangers to it (*h*). It was held, however, in *Daniel* v. *Stepney* (*i*), that where a lessee had granted a right of distress over land not included in the demise, the right held good against the assignees of such land who took it with notice. Whether such a right of distress, though valid against a subsequently appointed receiver on behalf of mortgagees (*k*), would be so as against strangers is not actually decided in terms, although it probably would be so. In *Tadman* v. *Henman* (*l*) it was held that a person who lets premises to which he has no

(*a*) *Walsh* v. *Lonsdale*, (1822) 21 Ch. D. 9, C. A.

(*b*) *Williams* v. *Stiven*, *supra*.

(*c*) 8 Ann. c. 14, ss. 6, 7.

(*d*) As to what is occupation to satisfy the statute, see *Taylerson* v. *Peters* (1837) 7 A. & E. 110; *Nuttall* v. *Staunton*, (1825) 4 B. & C. 51. The statute does not apply where the tenant remains in possession of part of the premises under a new tenancy (*Wilkinson* v. *Peel*, (1895) 1 Q. B. 516).

(*e*) *Beavan* v. *Delahay*, (1788 1. H. Bl. 5; *Knight* v. *Bennett*, (1826) 11 Moore. 227.

(*f*) *Per* Willes, J., *Grimwood* v. *Moss*, (1872) L. R. 7 C. P. p. 365.

(*g*) *Chapman* v. *Beecham*, (1842) 3 Q. B. 723.

(*h*) *Freeman* v. *Edwards*, (1848) 2 Ex. 732.

(*i*) (1874) L. R. 9 Ex. 185.

(*k*) And see *supra*, *Roundwood Colliery Co. In re.*

(*l*) (1893) 2 Q. B. 168.

title cannot distrain upon goods which are the property of third persons who do not claim any possession of or interest in the premises under the tenant, and which are upon the premises by the tenant's licence. The estoppel which prevents the tenant from disputing the title of the landlord does not extend to strangers in such a case.

Right of distress when barred.

A right of distress is barred altogether if not exercised within twelve years of the time when it first accrued, and the right of distraining for any particular sum is barred within six years of the time when it first accrued or was acknowledged in writing (*a*). In the case of tenancies under the Agricultural Holdings Act no rent can be distrained for which has been due more than a year, unless where it has been customary for the landlord to allow a postponement for a half-year or a quarter, and then the period of limitation is to run from the postponed date (*b*).

Illegal, irregular and excessive distress.

Assuming a party to show a *primâ facie* title to distrain, which is a question of the law of property, he will nevertheless be liable in an action when the distress is illegal, irregular or excessive.

Various kinds of illegal distress.

A distress may be absolutely illegal in a variety of ways: if made after tender, if after a previous distress (*c*), if it be made at the wrong place or time, if the manner of entry be wrongful, if goods are taken which the law protects from distress (*d*), if the distress is made contrary to agreement or by taking advantage of the distrainor's own wrong, and if made by unqualified persons (*e*). There are, moreover, certain special cases in which distress is not allowed.

After tender.

1. It is, of course, obvious that no one can be justified in distraining when without distraining he is able to obtain everything to which he is entitled. To complete a distress there must be a taking and an impounding (*f*). Before the taking the party liable may tender the amount for which there is a right to distrain, and after such tender the taking is a trespass. If between the taking and the impounding he make a sufficient

(*a*) 3 & 4 Will. IV. c. 27, s. 42; 37 & 38 Vict. c. 57, s. 1.

(*b*) 46 & 47 Vict. c. 61, s. 44.

(*c*) Though in this case if the first distress amount to a trespass *ab initio*, a second and valid distress is justifiable, *Grunnell* v. *Welch*, (1905) 2 K. B. 650.

(*d*) See *Secretary of State for War* v. *Wynne & Others*, (1905) L. T. Paper, Nov. 4th, p. 10.

(*e*) *Perring & Co.* v. *Emerson's Law Times Paper*, (1905) Nov. 4th, p. 10.

(*f*) As to impounding, see below, pp. 305 *sqq*.

tender he has a right to obtain his goods back again; after the impounding the tender is too late (*a*). Nevertheless, if it be in fact accepted the goods ought to be restored, and although the mere keeping them may not be actionable a refusal to deliver them or a dealing with them inconsistent with the right of the distrainee may afford a cause of action (*b*).

Tender of expenses.

A landlord may charge the reasonable expenses of his distress, and therefore after seizure such expenses must be included in the tender, but before seizure it is sufficient if the rent actually in arrear be tendered (*c*).

Remedy for rent not suspended by giving negotiable security.

The mere fact that a note or bill has been given in respect of rent in arrear does not *ipso facto* operate as a suspension of the right of distress (*d*), but it is evidence of an agreement to suspend such right during the currency of the note or bill (*e*).

No set-off against rent.

On the same principle there is no general right of set-off against rent (*f*).

Certain deductions allowed.

If, however, an under-tenant, on compulsion pay rent to the superior landlord, this is considered a payment on account which he is entitled to deduct from the next rent which becomes due to his immediate landlord (*g*). So, too, a tenant may deduct payments which he has been compelled to make on account of rates and taxes, chargeable on the landlord by the terms of the demise (*h*). In the case of payments made by the tenant on account of the landlord's property tax he may make the deduction from the next instalment of rent, any agreement to the contrary notwithstanding (*i*). And tenants who are called upon to pay arrears due from former occupiers are entitled

(*a*) *Six Carpenters' case*, (1610) 8 Rep. p. 147a; *Gulliver* v. *Cosens*, (1845) 1 C. B. 788. It is said in *Evans* v. *Elliott*, (1836) 5 A. & E. 142, that the wrongful detaining of goods after a tender is of itself a trespass, but this does not seem in accordance with the views expressed in *Gulliver* v. *Cosens*, *supra*, and *West* v. *Nibbs*, (1847) 4 C. B. 172. If the mere detention is not actionable, the distrainee ought, it would seem, at the time of tender to make a demand, the refusal of which would give good evidence of a conversion. It is only where the original taking is unlawful that the distress is illegal. Anything afterwards is an irregularity. See below, pp. 305 *sqq*.

(*b*) *West* v. *Nibbs*, *supra*.

(*c*) *Bennett* v. *Bayes*, (1860) 5 H. & N. 391.

(*d*) *Davis* v. *Gyde*, (1833) 2 A. & E. 623.

(*e*) *Baker* v. *Walker*, (1845) 14 M. & W. 465; *Palmer* v. *Bramley*, (1895) 2 Q. B. 405.

(*f*) *Andrew* v. *Hancock*, (1819) 1 B. & B. 37.

(*g*) *Carter* v. *Carter*, (1829) 5 Bing. 406.

(*h*) *Palmer* v. *Earith*, (1845) 14 M. & W. 428.

(*i*) 5 & 6 Vict. c. 35, ss. 60, 103. See *Denby* v. *Moore*, (1817) 1 B. & Ald. 123; and see 16 & 17 Vict. c. 34, s. 40.

to deduct the amount from their rent (*a*). By 46 & 47 Vict. c. 61, s. 47, an agricultural tenant is entitled to set off any ascertained amount of compensation due under the Act by custom or contract against rent, and the landlord can only distrain for the balance. Set-off in agricultural tenancies.

A tender should, of course, be continuing, though if a landlord refuse an adequate and unconditional tender, he may thereby lose his right to distrain. But a mere attendance on the land to pay rent, without actual tender, does not avoid the landlord's right (*b*). A tender may always be made either to the landlord or to the person to whom the distress warrant is directed. In any other case an actual authority to receive the money must be proved (*c*).

2. It would be an obvious hardship for a landlord unnecessarily to multiply distresses. Therefore, if after putting in a distress and having had an opportunity of realising his rent, he has neglected to do so, his remedy by distress is gone, and he is put to his action. If he distrains again he will be a mere trespasser (*d*). When, however, the original entry is a trespass *ab initio*, a second and valid distress is justifiable (*e*). And if on distraining first he cannot find enough to satisfy his claim he may either abandon (*f*) the distress altogether and subsequently distrain for the whole amount, or realise what he can and distrain for the residue (*g*). If a reasonable explanation be given of the abandonment, or inadequate execution, of a distress, it is no bar to another, even though it appear that there were enough goods on the premises to satisfy the claim. If the tenant has done anything equivalent to saying, "Forbear to distrain now, and postpone your distress to another time," or, if the lessee Repeated distresses.

When second distress lawful after first abandoned.

(*a*) 16 & 17 Vict. c. 34, s. 35.

(*b*) *Horne* v. *Lewin*, (1700) Lord Raym. 639.

(*c*) *Smith* v. *Goodwin*, (1883) 4 B. & Ad. 413; *Hatch* v. *Hale*, (1850) 15 Q. B. 10.

(*d*) In such a case, however, though the tenant has his action of trespass, he cannot replevy successfully, because the fact of rent being due would be an answer (*Hudd* v. *Ravenor*, (1821) 2 B. & B. 662).

(*e*) *Grunnell* v. *Welch*, (1905) 2 K. B. 650

(*f*) As to abandoning a distress, see *Smith* v. *Goodwin*, (1833) 4 B. & Adol. 413; 38 R. R. 272; *Swann* v. *Earl of Falmouth*, (1828) 8 B. & C. 456, and below, p. 294.

(*g*) *Dawson* v. *Cropp*, (1845) 1 C. B. 961; *Hutchins* v. *Chambers*, (1758) 1 Burr. 579, at p. 589. A point may arise as to whether a distrainor in computing the sufficiency of a distress on a question of abandonment is bound to take into calculation the growing crops. It would seem that he is not. See *Piggott* v. *Birtles*, (1836) 1 M. & W. 441.

prevents the lessor making the first distress available, in either of such cases the landlord may distrain a second time (*a*), provided that in the interim the property in the goods has not passed to a trustee in bankruptcy (*b*). Where, after a sale of distrained goods the distrainee refused to let the purchaser take possession, it was held that the sale might be rescinded and a second distress levied (*c*).

Separate distresses for separate instalments of rent.

It is to be observed that it is not necessary to distrain at once for all the arrears that may happen to be due. A demand may not be split (*d*), but for several instalments there may be several distresses (*e*). And for the same instalment there may be different distresses when the right has become vested in different hands, as by an apportionment of rent or a division of a rent-charge (*f*).

Where distress to be taken.

3. Both by common law and statute (*g*) a distress can only be taken from the premises out of which the rent issues (*h*). Conversely, to give a right of distress for an annual payment is to make it a charge on the land in respect of which the distress is given (*i*). If the occupier of the land subject to rent enjoys in connection with it any easement in the nature of a right of way his chattels are not distrainable while on the servient premises (*k*).

Distress on highway.

It is expressly forbidden by the statute above referred to to distrain on the highway. It was held, indeed, in *Hodges* v. *Lawrance* (*l*) that a distress might be taken on that part of a highway adjoining the demised premises, the presumption being that they extended to the middle of the highway. The sole point however, argued in the case was as to the true boundary of the premises. A passage in Co. Litt. (*m*) is directly to the contrary

(*a*) *Per Cur. Bagge* v. *Mawby*, (1853) 8 Ex. p. 649; *Lee* v. *Cooke*, (1858) 27 L. J. Ex. 337; and see *per Cur. Hutchins* v. *Chambers*, (1758) 1 Burr. p. 589; *Thwaites* v. *Wilding*, (1883) 11 Q. B. D. 421; 12 Q. B. D. 4.

(*b*) *Ford, In re*, (1900) 69 L. J. Q. B. 74.

(*c*) *Lee* v. *Cooke*, (1857–8) 2 H. & N. 584; 3 H. & N. 203.

(*d*) *Owens* v. *Wynne*, (1855) 4 E. & B. 579.

(*e*) *Gambrell* v. *Earl of Falmouth*, (1835) 4 A. & E. 73; *Owens* v. *Wynne* (1855) 4 E. & B. 579.

(*f*) *Rich* v. *Watson*, (1839) 5 M. & W. 255.

(*g*) 52 Hen. III. c. 15.

(*h*) Except by the Crown, as to which, see Chitty on Prerogative, p. 208.

(*i*) *Butt's Case*, (1600) 7 Rep. p. 24a.

(*k*) *Buszard* v. *Capel*, (1828–9) 8 B. & C. 141.

(*l*) (1854) 18 J. P. 347. See *Gillingham* v. *Gwyer*, (1867) 16 L. T. N. S. 640.

(*m*) p. 161a.

effect. "If the rent of the land is behind, and the lord distrain the cattle of the tenant upon the highway within his fee, the tenant may make rescous, for that it is forbidden by law to distrain in the highway." It is said, however, that if a distress is objectionable only on the ground that it is taken on the highway it is not altogether illegal, but a special action on the statute must be brought (*a*).

Distress on land other than that from which rent issues.

There are cases in which land not subject to a rent may yet be subject to a distress. A man may charge a rent on one piece of land, and give the grantee a right in default of sufficient distress there to distrain on another piece of land (*b*). So, a right may be given to the tenant of land subject to a charge, in case he is distrained on to indemnify himself by distraining on other land (*c*). It has, however, never been held that in case of a rent service there can be any distress in the true sense, that is to say, valid against strangers to the demise, except on the premises out of which the rent issues (*d*).

Removal to avoid distress.

Fresh pursuit.

If the person coming to make the distress finds the tenant in the act of removing his chattels for the purpose of avoiding the distress, he may follow them off the land and take them on a fresh pursuit (*e*).

Cattle may be distrained on common.

Goods fraudulently removed.

By 11 Geo. II. c. 19, s. 8, landlords and lessors may distrain cattle and stock of their tenants depasturing on any common belonging to the demised premises. By s. 1 of the same statute they may distrain goods fraudulently or clandestinely removed from the demised premises within thirty days of the removal, wherever they may be found. These provisions are only in favour of landlords, and by the terms of the statute it appears that they do not apply except in case of a rent reserved on a lease.

Goods of stranger cannot be followed.

The goods removed must be those of the tenant himself; other parties may lawfully withdraw their goods from the reach of the landlord (*f*). If the grantee of a bill of sale given by the tenant

(*a*) Gilbert on Distress, 4th ed. p. 51.

(*b*) *Butt's case*, (1600) 7 Rep. 23a; Co. Litt. p. 147a.

(*c*) See Bythewood & Jarman's Conveyancing, 4th ed. Vol. 2, p. 939.

(*d*) The point was argued but not decided in *Daniel* v. *Stepney*, (1874) L. R. 9 Ex. 185, where it was held that a power of distress outside the demised premises given by a lease was good against assignees with notice.

(*e*) Co. Litt. 161a. *Per Cur. Rand* v. *Vaughan*, (1835) 1 Bing. N. C. p. 769.

(*f*) *Thornton* v. *Adams*, (1816) 5

removes goods comprised in the bill of sale in order to avoid a distress, the landlord will have no right of action against him even though the provision of s. 13 of the Bills of Sale Act, 1882, which requires that the chattels seized shall not be removed or sold for five days, has not been complied with (*a*).

Rent due.

Rent must be due at the time of removal (*b*), but need not be in arrear. Therefore goods which are moved on the morning of rent-day may on the next day be followed (*c*), although at the time of the removal they were not liable to distress (*d*).

Intent must be fraudulent.

The removal must not merely be with the intent of defeating the distress, but with the fraudulent intent of so doing. It is not fraudulent if the tenant prefers to use the goods in satisfying the claim of a *bonâ fide* creditor in preference to that of his landlord (*e*). Although secrecy is a badge of fraud there may be fraud without secrecy; however openly the goods are removed they may be followed if the intent was fraudulent (*f*).

Bonâ fide purchaser.

The goods removed cannot be followed into the hands of a *bonâ fide* purchaser (*g*).

Goods cannot be followed when tenancy at an end.

If before the thirty days have elapsed the tenancy determines and the occupation ceases the right to distrain is gone, for the object of the statute was to enlarge the landlord's remedy in respect of place but not of time (*h*).

Forcible entry to take goods.

The statute gives power to make forcible entry for the purpose of recovering the goods fraudulently removed, provided that in every case the party making entry is accompanied by a constable of the locality (*i*), and in case of entry on a dwelling-house, that it is made in the daytime, and oath is made before a justice of

M. & S. 38; *Tomlinson* v. *Consolidated Credit & Mortgage Corporation*, (1889) 24 Q. B. D. 135.

(*a*) *Tomlinson* v. *Consolidated Credit & Mortgage Corporation*, (1889) 24 Q. B. D 135; *Lane* v. *Tyler*, (1887) 56 L. J. Q. B. 461.

(*b*) *Rand* v. *Vaughan*, (1835) 1 Bing. N. C. 767.

(*c*) *Dibble* v. *Bowater*, (1853) 2 E. & B. 564. Rent is due on the first moment of the rent day; it is only in arrear on the first moment of the next day.

(*d*) See below, p. 293.

(*e*) *Bach* v. *Meats*, (1816) 5 M. & S. 200. And if the goods are removed to avoid a distress which is honestly believed to be illegal, this, it seems is not a fraudulent removal; *John* v. *Jenkins*, (1832) 1 C. & M. 227.

(*f*) *Opperman* v. *Smith*, (1824) 4 D. & R. 33; *Stanley* v. *Wharton*, (1821-2) 9 Price, 301.

(*g*) s. 2.

(*h*) *Gray* v. *Stait*, (1879) 11 Q. B. D. 668.

(*i*) A special constable will suffice; *Cartwright* v. *Smith*, (1833) 1 Moo. & R. 284.

the peace that there is reasonable ground to suspect that the goods are therein (*a*). The statutory requirements must be strictly complied with or the entry will be unlawful (*b*). There is nothing in the enactment to give protection in case the goods are not actually found on the premises when entry is made.

Time of distress.

4. Distress for rent can only legally be made between sunrise and sunset (*c*), and it would seem that the time must be fixed by the apparent rise and set and not by astronomical calculation (*d*). A distress cannot be taken until the day after the rent falls due (*e*). There is apparently no reason why a distress for rent should not be levied on a Sunday (*f*).

Manner of entry.

5. It is illegal to enter forcibly for the purpose of distraining (*g*). The rules which have been laid down on this subject are not very clear or consistent, and differ in some respects from those with regard to executions. The general principle seems to be that the entry must be made in the accustomed mode of obtaining admittance, as for example by lifting the latch of the door (*h*). It has been held, however, that though it is not lawful to lift an unfastened window, yet if the window be partially open it may be further raised and an entry thus made. It can hardly be said that this is a normal method of admittance (*i*). In *Gould* v. *Bradstock* (*k*) the landlord occupied a room over his tenant, separated only by a boarding. He raised the boards, entered, and distrained, and it was held that this highly unusual entrance was lawful, on the curious ground that he was tenant in common of the boards, and therefore committed no trespass in raising them. If an admittance is lawfully obtained inner doors may be afterwards broken open to find the goods (*l*). The rule as to

Inner doors.

(*a*) s. 7. It is usual for a magistrate to give a written authority, but the Act does not require it.

(*b*) *Rich* v. *Woolley*, (1831) 7 Bing. 651.

(*c*) *Tutton* v. *Darke*, (1860) 5 H. & N. 647 ; Co. Litt. 142a.

(*d*) But see 43 & 44 Vict. c. 9.

(*e*) Co. Litt. p. 47b.

(*f*) In *Werth* v. *London and Westminster Loan & Discount Co.* (1889) 5 Times L. R. 521, Mathew, J., is indeed reported to have assented to the suggestion of counsel that a distress levied on Sunday would be illegal. But he gave no reason for his view, nor was the point necessary to the decision. Nor apparently is distress within 29 Car. II. c. 7, s. 6.

(*g*) *Grunnell* v. *Welch*, (1905) 2 K.B. 650.

(*h*) *Ryan* v. *Shilcock*, (1851) 7 Ex. 72.

(*i*) *Crabtree* v. *Robinson*, (1885) 15 Q. B. D. 312 ; and see *Tutton* v. *Darke*, *supra*.

(*k*) (1812) 4 Taunt. 562.

(*l*) Buller, N. P. p. 81c.

Outbuildings.

the manner of entry applies not merely to dwelling-houses but to any other buildings or enclosures (*a*) directly in communication therewith. In *Eldridge* v. *Stacey* (*b*) the broker climbed a wall into a back yard and entered by lifting the latch of the back door. It was held that the distress was lawful, but four years later Byles, J., after consulting the judges of the same Court on a similar state of facts, held the entry unlawful (*c*). The latter case, however, was much questioned, and *Eldridge* v. *Stacey* was approved, by the Court of Appeal, in the modern case of *Long* v. *Clarke* (*d*).

Forcible re-entry.

If a peaceable entry is once made the person distraining may subsequently re-enter, if necessary by force, for the purpose of carrying out the distress, unless in the meantime it has been abandoned (*e*). It is not necessarily an abandonment if the goods are left impounded on the premises with no one in charge (*f*). *A fortiori* if the man in possession is expelled by force or fraud he may subsequently re-enter with the strong hand; but this right must be exercised in a reasonable manner, for long delay will be evidence of abandonment. In *Eldridge* v. *Stacey* (*g*) it was held a question for the jury whether a delay of three weeks after an expulsion amounted to an abandonment.

Not after abandonment.

What may be taken.

6. As a general rule all property found on the premises subject to the distress is liable to be taken without reference to the rights of third parties (*h*), though it has been held that a purely personal licence to use a patented article distrained upon is not communicable to a third party, being a right of an incorporeal nature (*i*).

(*a*) *Brown* v. *Glenn*, (1851) 16 Q. B. 254. The law with regard to executions is different. See Ch. XXII.

(*b*) (1863) 15 C. B. N. S. 458.

(*c*) *Scott* v. *Buckley*, (1867) 16 L. T. N. S. 573.

(*d*) (1894) 1 Q. B. 119.

(*e*) *Eagleton* v. *Gutteridge*, (1843) 11 M. & W. 465. It is not an entry if a man just gets part of his body inside (*Boyd* v. *Profaze*, (1867) 16 L. T. N. S. 431).

(*f*) *Jones* v. *Biernstein*, (1900) 1 Q. B. 100; *Swann* v. *Earl of Falmouth*, (1828) 8 B. & C. 456; *Bannister* v. *Hyde*, (1860) 2 E. & E. 627.

(*g*) (1853) 15 C. B. N. S. 458.

(*h*) It was at one time supposed that there was a less extensive right of distress in case of a rent-charge (Com. Dig. Distress, B. 2). But this is not so (*Suffery* v. *Elgood*), (1834) 1 A. & E. 191; and *Johnson* v. *Faulkner*, (1842) 2 Q. B. 925). Certain statutes, however, as will be pointed out, give special rights to landlords only.

(*i*) *British Mutoscope Co.* v. *Homer*, (1901) 1 Ch. 671,

Beside this unusual incident, there are, however, several exceptions to the general rule stated above.

Exceptions.

(a.) In the first place there is no right of distress against the property of the Crown or ambassadors of foreign powers (*a*).

Crown and foreign envoys.

(b.) Secondly, for the benefit of commerce things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ, are privileged (*b*). There must have been a delivery of the things, a transfer of possession to the person on whose premises they are seized. Where a shipbuilder was constructing a vessel under a contract by which the property in the hull vested in his employer before delivery, and it was distrained upon in his yard, it was held that there was no privilege (*c*). The person to whom the delivery is made must exercise a public trade, not in the sense that he is bound to deal with all the world, but in the sense that he keeps open shop or holds himself out as ready to do business with the public generally. It was held, indeed, in *Rede* v. *Burley* (*d*) that goods taken to a weighing machine which a man kept for his own private use were privileged; this case, however, seems inconsistent with all the other authorities (*d*). But if the business is public in its character the extent to which it is carried is immaterial (*e*). As a general rule the goods must not only be in the possession of some public trader, but at some place where he carries on business. Goods in the hands of an auctioneer conducting a sale at a private house are not privileged (*f*). To this there is an exception in favour of carriers; for goods in their

Things delivered in the way of trade.

Public trade.

(*a*) *Secretary of State for War* v. *Wynne & others*, Law Times Paper, Nov. 4th, 1905, p. 10; and see below, p. 304.

(*b*) *Simpson* v. *Hartopp*, (1743) Willes, 512.

(*c*) *Clarke* v. *Milwall Dock Co.*, (1886) 17 Q. B. D. 494.

(*d*) (1597) Cro. Eliz. 596. See particularly *Crosier* v. *Tomkinson*, (1759) 2 Kenyon, 439, where horses at a stable lent *pro hac vice* were held distrainable. In *Gisbourn* v. *Hurst*, (1709) 1 Salk. 249, the privilege was that of the carrier not of the premises. If a man agist cattle once in a way such cattle at common law are not protected; but it might be different if he made a business of agisting. See *per* Mellor, J., *Miles* v. *Furber*, (1873) L. R. 8 Q. B. p. 83.

(*e*) *Gibson* v. *Ireson*, (1842) 3 Q. B. 39. For instances of public trades, see *Findon* v. *M'Laren*, (1845) 6 Q. B. 891 (commission agent); *Adams* v. *Grane*, (1833) 1 C. & M. 380 (auctioneer); *Gilman* v. *Elton*, (1821) 3 B. & B. 75 (factor); *Brown* v. *Sheeill*, (1834) 2 A. & E. 138 (slaughterman); *Wood* v. *Clarke*, (1831) 1 C. & J. 484 (weaver); *Swire* v. *Leach*, (1865) 18 C. B. N. S. 479 (pawnbroker); *Miles* v. *Furber*, (1873) L. R. 8 Q. B. 77 (warehouseman).

(*f*) *Lyons* v. *Elliott*, (1876) 1 Q. B. D. 210.

hands for the purpose of transit cannot be seized on premises where they may be temporarily deposited (*a*).

For purpose of trade.

The goods must be delivered for the purpose of being carried, wrought, worked up, or managed. Under the word management is included the custody of innkeepers, pawnbrokers, and warehousemen (*b*). It was held, indeed, in *Parsons* v. *Gingell* (*c*), that horses at livery are liable to distress, but this case has been disapproved of (*d*). The object of the delivery must be that the person to whom they are delivered should exercise his trade upon them. In *Wood* v. *Clarke* (*e*), yarn was delivered to a weaver, and a loom was lent him to do his work. It was held that the yarn was privileged, but not the loom. In *Muspratt* v. *Gregory* (*f*), a barge was sent to a manufacturer's premises by a purchaser to be loaded with his goods: it was held not privileged. In *Joule* v. *Jackson* (*g*), the plaintiff had supplied beer to an innkeeper in barrels belonging to the plaintiff, which were distrained at the inn. The distress was held lawful. In all these cases the goods were delivered not to be dealt with in the way of trade, but in order to facilitate the operations of the trade. But, on the other hand, it has been held that a sewing machine in the possession of a tenant, under a hire-purchase agreement, and used by his wife for the support of the family, is privileged from distress by 51 & 52 Vict. c. 21, s. 4 (*h*).

Things accessory to privileged goods.

It was said in *Rede* v. *Burley* (*i*) that the horse or vehicle which either takes or is sent for privileged goods is itself privileged. But this is now overruled (*k*). It may be, however, that anything which is purely accessory to the privileged goods at the time of seizure is itself privileged. Thus the case or vehicle or vessel in which the goods are may be protected (*l*). If a saddled horse is taken to a farrier to be shod, the saddle cannot be seized while it is on the horse; but if it be taken off him, it may then

(*a*) *Gisbourn* v. *Hurst*, *supra*, p. 295.
(*b*) *Crosier* v. *Tomkinson*, *supra*; *Swire* v. *Leach*, *supra*; *Miles* v. *Furber*, *supra*, p. 295.
(*c*) (1847) 4 C. B. 545.
(*d*) See *per* Cockburn, C.J., *Miles* v. *Furber*, (1873) L. R. 8 Q. B. p. 82.
(*e*) (1831) 1 C. & J. 484, *supra*.
(*f*) (1836–8) 1 M. & W. 633; 3 M. & W. 677.
(*g*) (1841) 7 M. & W. 450.
(*h*) *Masters* v. *Fraser*, (1902) 85 L. T. 611; 66 J. P. 100.
(*i*) (1597) Cro. Eliz. 596.
(*k*) *Muspratt* v. *Gregory*, (1836–8) *supra*.
(*l*) *Per* Alderson, B., *Muspratt* v. *Gregory*, (1836) 1 M. & W. p. 647.

be distrainable (*a*). A distrainor had no right at common law to sever one thing from another, because he could not return them in the same condition; therefore if he found a horse harnessed to a cart, he could not take one without the other (*b*).

Goods on way to fair or market.

(c.) In addition to things within the rule in *Simpson* v. *Hartopp* (*c*), there is a special privilege attaching to goods in a public fair or market, or on their way thither, for the purposes of sale. If a man driving his beast to market agists them for the night before the market in a field, the landlord cannot distrain. The occupier of the field clearly does not come within the definition of a person to whom goods are delivered in the way of his trade, but the privilege is the privilege of the market (*d*).

Textile machinery and materials.

(d.) Besides the common law exemptions, by 6 & 7 Vict. c. 40, s. 18, any apparatus or materials in certain textile manufactures entrusted to workmen shall not be distrained except for rent due by the owner.

Rolling stock.

(e.) By 35 & 36 Vict. c. 50, ss. 3, 5, railway rolling stock, if sufficiently marked with the owner's name, is protected from distress on works connected with the railway by sidings, except to the extent of any interest which the tenant of the works may have in such stock.

Agricultural machinery and breeding stock.

Agisted cattle.

(f.) By 46 & 47 Vict. c. 61, s. 45, on agricultural holdings as defined by the Act, hired machinery, and stock sent solely for breeding purposes, are absolutely protected. Agisted (*e*) cattle may not be taken except no other sufficient distress can be found, and then only to the extent of the tenant's interest.

Lodgers' goods.

(g.) Another case in which protection is given to the goods of strangers is by the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79). If the goods of a lodger are taken under a distress levied on his immediate landlord by the superior landlord, he may serve on the distrainor an inventory and declaration in the form prescribed (*f*) and pay him any rent due from him to the extent

(*a*) *Per* Brian, C.J., 22 Edw. IV. 50, pl. 15.

(*b*) *Per* Brian, C.J., 20 Edw. IV. 3, pl. 16, and see Vin. Abr. tit. Distress.

(*c*) (1743) Willes, 512.

(*d*) *Nugent* v. *Kerwin*, (1838) 1 Jebb & Symes, 97. *Per* Alderson, B., *Muspratt* v. *Gregory*, (1836) 1 M. & W. p. 647; Co. Litt. p. 47a. But see Bac. Ab. Distress B.

(*e*) See *London & Yorkshire Bank* v. *Belton*, (1885) 15 Q. B. D. 457.

(*f*) As to sufficiency of this, see *Ex parte Harris*, (1885) 16 Q. B. D. 130; *Thwaites* v. *Wilding*, (1883) 11 Q. B. D. 421; 12 Q. B. D. 4. As to who is a

of the distrainor's claim. If the distress is after this proceeded with, an action for illegal distress lies (*a*), not only against the landlord but also against the bailiff (*b*). It is to be observed that this Act gives no protection except in case of a distress for rent on a demise.

Goods in custody of law.

(h.) Under this head also, of protection to the rights of third parties, may be considered the privilege of things in the custody of the law (*c*). Goods are in the custody of the law when an officer of the law is in lawful possession of them under a legal process, or when they have been lawfully distrained upon and not abandoned; and, as will be seen hereafter, in case of distress the goods, after impounding, are in the custody of the law, even though it may turn out that the distress was altogether illegal (*d*). It has, however, been held by the Court of Appeal in Ireland that a landlord's claim for twelve months' rent, actually in arrear, takes priority, after notice, to a seizure in execution by a special bailiff (*e*). Where growing crops are sold in an execution they are, in the hands of the vendee, privileged from distress until they can be harvested (*f*). However, by 14 & 15 Vict. c. 25, s. 2, in such a case the landlord may seize for subsequently accruing rent, provided he can find no other sufficient distress (*g*).

There are several cases in which goods are protected from distress even though they are the property of the distrainee.

Things in use.

(a.) Things in actual use are privileged from distress on the grounds of the general danger to the peace which would ensue from attempts to seize them. Therefore a tool or machine which a man is working with, or a horse which he is leading, riding, or driving, cannot be distrained (*h*). If, however, they were not in actual use, the privilege at common law was conditional upon there being other goods of sufficient value upon the premises (*i*).

lodger, see *Phillips* v. *Henson*, (1877) 3 C. P. D. 26; *Ness* v. *Stephenson*, (1882) 9 Q. B. D. 245; *Heawood* v. *Bone*, (1884) 13 Q. B. D. 179; *Morton* v. *Palmer*, (1881) 51 L. J. Q. B. 7.

(*a*) *Godlonton* v. *Fulham & Hampstead Property Co.*, (1905) 1 K. B. 431.

(*b*) *Lowe* v. *Dorling & Son*, (1905) 2 K. B. 501.

(*c*) Co. Litt. p. 47a.

(*d*) See below, p. 317.

(*e*) *Wren* v. *Stokes*, (1902) 1 Ir. R. 167.

(*f*) *Wharton* v. *Naylor*, (1848) 12 Q. B. 673.

(*g*) As to the landlord's right in case of an execution, see Ch. XXII.

(*h*) Co. Litt. p. 47a; *Storey* v. *Robinson*, (1795) 6 T. R. 138; *Simpson* v. *Hartopp*, (1743) Willes, 512.

(*i*) *Nargatt* v. *Nias*, (1859) 28 L. J. Q. B. 143.

But now, by virtue of the Law of Distress Amendment Act, 1888 (subject to one proviso), the privilege is absolute to the value of 5*l*. What is actual use is a question of fact, subject to the limitation on the one hand and the other that it is not necessary to prove a manual use, nor sufficient to prove a mere custody and control. In *Field* v. *Adames* (*a*), an allegation that a horse and harness were in the actual possession of the plaintiff, and under his personal care and being used by him, was held sufficiently to allege privilege. In *Bunch* v. *Kennington* (*b*) nearly identical allegations with regard to a dog were held insufficient. In the old case of *Webb* v. *Bell* (*c*) a horse was seized while harnessed to a loaded cart, and the Court decided that it was a good distress. This case is doubted in *Simpson* v. *Hartopp* (*d*), but it is submitted that it is consistent with the other authorities, as it does not appear that any one was in charge of the horse, and therefore, though in use in one sense, it may not have been in use within the meaning of the rule.

Animals *feræ naturæ*.

(b.) Certain things are privileged on account of their nature; of these, animals *feræ naturæ*, things annexed to the freehold, things that cannot be restored in the same state, are privileged absolutely. Animals *feræ naturæ* are privileged because they are not strictly speaking the subject of property (*e*).

Chattels real.

Fixtures.

(c.) Things belonging to the freehold are not distrainable; under this head come, in the first place, those movable chattels which necessarily go with the land, such as keys, heirlooms, and title deeds (*f*). In the second place come fixtures, whether or not they are removable between heir and executor or landlord and tenant (*g*). That may be a fixture which is not actually attached to the soil, but simply left steadfast by its own weight, as, for example, a dry stone wall or statuary which is part of an architectural design, or "dog-grates" resting by their own weight (*h*).

(*a*) (1840) 12 A. & E. 649.

(*b*) (1841) 1 Q. B. 679.

(*c*) (1669) 1 Sid. 440.

(*d*) (1743) Willes, 512. See also page of rept. 517.

(*e*) Co. Litt. 47a. It is stated in this passage that dogs cannot be distrained, but this appears not to be law at the present day. See *Bunch* v. *Kennington*, *supra*; Bac. Ab. Distress B. Deer, not restrained in a private enclosure for sale or profit, are apparently *feræ naturæ* (*Threlkeld* v. *Smith*, (1901) 2 K. B. 531).

(*f*) See *per Cur.*, *Hellawall* v. *Eastwood*, (1851) 6 Ex. p. 311.

(*g*) *Darby* v. *Harris*, (1841) 1 Q. B. 895.

(*h*) *Monti* v. *Barnes*, (1901) 1 K. B. 205, C. A.

But in such a case the presumption that a thing is a mere chattel must be rebutted, and the intention to make it part of the freehold be manifest. When a thing is actually fastened to the soil, if severance cannot take place without injury either to itself or the freehold it is necessarily a fixture. If it is only lightly attached, then it is still a fixture, unless the fastening is for a mere temporary purpose, and for the more complete enjoyment and use of it as a chattel. On this rule the distinctions taken are rather fine. Thus a carpet nailed to a floor is not a fixture; tapestry nailed to a wall is not a fixture (*a*). There seems, however, to be little doubt that all things attached to the soil for trade purposes are fixtures, and not distrainable (*b*). A fixture does not lose its quality by being severed for some temporary purpose (*c*). Where you have a machine or other thing which is a fixture, all the essential accessories must be treated as part of it, and likewise fixtures, as, for example, the driving belts of an engine (*d*).

Things growing on soil.

Things growing on the soil are privileged on the same principle as fixtures (*e*), but a statutory exception has been introduced in favour of landlords only. By 11 Geo. II. c. 19, s. 8, they may take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product which shall be growing on any part of the demised premises for rent. By the word product must be understood that which is *ejusdem generis* with the crops specifically enumerated, something which ripens and may be gathered (*f*). This enactment does not make the crops distrainable in all events; it simply puts them on the same footing as ordinary chattels. At one time they were absolutely privileged if seized by the sheriff, and so in the custody of the law (*g*).

Corn, grass, &c.

But it is now provided by 14 & 15 Vict. c. 25, s. 2, "that in case all or any part of the growing crops of the tenant of any

(*a*) As between tenant for life and reversioner, *Leigh* v. *Taylor*, (1902) A. C. 157; *De Falbe, In re*, (1901) 1 Ch. 523, C. A.

(*b*) *Reynolds* v. *Ashby & Son*, (1904) A. C. 466; *D'Eyncourt* v. *Gregory*, (1866) L. R. 3 Eq. 382; *Holland* v. *Hodgson*, (1872) L. R. 7 C. P. 328. In this case the whole of the authorities are reviewed.

(*c*) *Per* Lord Kenyon, *Gorton* v. *Falkner*, (1792) 4 T. R. 567.

(*d*) *Sheffield and South Yorks. Building Society* v. *Harrison*, (1884) 15 Q. B. D. 358; *Ex parte Lloyds' Banking Co.*, (1869) L. R. 4 Ch. 630.

(*e*) *Simpson* v. *Hartopp*, (1743) Willes, 512.

(*f*) *Clark* v. *Gaskarth*, (1818) 8 Taunt. 431.

(*g*) *Peacock* v. *Purvis*, (1820) 2 B. & B, 362; but see 56 Geo. III. c. 50,

. . . lands shall be seized by any . . . officer by virtue of any writ . . . of execution, such crops, so long as the same shall remain on the farms or lands, shall in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for the recovery of such rent" (*a*).

Things which cannot be restored in same condition.

(d.) Things which cannot be restored in the same condition are not distrainable, because with regard to them the right of the owner to get his goods back by replevin would be nugatory (*b*). Two dangers are taken into consideration; the danger of things deteriorating or being injured, and the danger of their being lost. Under the former head articles of a perishable nature were exempted, as, for example, butcher's meat (*c*). So at common law loose sheaves and cocks of corn could not be seized, because they must necessarily be damaged in removal. Under the latter was exempted everything lying loose in bulk. Corn in a cart could be taken, but not corn in a stack. So money was distrainable if in a bag or chest, otherwise not (*d*). But by 2 Will. & Mar. c. 5, s. 3, all corn, hay, and straw are liable to distress.

Things perishable.

Things loose in bulk.

Wearing apparel, tools and bedding.

(e.) By statute (*e*) the wearing apparel and bedding (*f*) of the distrainee and his family, and the tools and implements of his trade to the value of five pounds, are exempt from distress (*g*). It is to be observed that no absolute protection is given by this enactment to any particular chattel, and therefore it would seem that except where the total value of the apparel, bedding and tools does not exceed five pounds, a breach of the statute would not constitute a trespass but only an irregularity, in respect of which the aggrieved party might sue for the actual damage sustained. The enactment does not apply where the interest of the tenant has expired and possession has been demanded not less than seven days before the distress.

Things conditionally privileged.

(f.) Certain things are privileged conditionally on there being

(*a*) As to rule regarding live stock, see *Wren* v. *Stokes*, (1902) 1 Ir. R. 167.

(*b*) *Simpson* v. *Hartopp*, (1743) Willes, 512.

(*c*) *Morley* v. *Pincombe*, (1848) 2 Ex. 101.

(*d*) *Wilson* v. *Ducket*, (1675) 2 Mod. 61; Vin. Ab. Distress, H. 8–17; Bac. Ab. Distress B.

(*e*) 51 & 52 Vict. c. 21, s. 4.

(*f*) Bedding includes bedstead (*Davis* v. *Harris*, (1900) 1 Q. B. 729).

(*g*) *Masters* v. *Fraser*, (1902) 85 L. T. 611.

found other sufficient distress on the premises (*a*). These are beasts that gain the land, that is to say, draught cattle, sheep, agricultural utensils and machinery intended for use on the land, and the implements which a man has in his possession for the purpose of using them in his trade or profession (*b*). All of these things must be ready and intended for actual use. Thus, where a farm tenant hired a threshing machine and it remained on his premises after the work was done, it was held altogether unprivileged (*c*). So horses and steers not yet broken in have no privilege (*d*).

Beasts of the plough.

Implements of trade or calling.

The privilege, subject to certain statutory limitations, exists in favour of the owner of the goods, as well as of the occupier of the premises (*e*).

Other sufficient distress.

It is not sufficient for the privilege that in fact there should be other sufficient distress on the premises. It must be *found*, that is to say, be discoverable by reasonable diligence (*f*), but the burden of proof lies on the distrainor to show that he did make proper search and was unable to satisfy his claim (*g*). He will not necessarily be liable because he has under-estimated the value of what he discovered (*h*). Nor in calculating what is a sufficient distress is he bound to take into consideration the growing crops, even though he has distrained upon them, insomuch as they are not immediately available (*i*).

Distress contrary to agreement.

7. If a person who would otherwise in law be entitled to distrain contracts not to do so, or only to distrain under certain conditions, and nevertheless does distrain contrary to his agreement, he is liable not merely in respect of his breach of contract but for an altogether wrongful act. In *Giles* v. *Spencer* (*k*) the defendant let

(*a*) Co. Litt. p. 47b.

(*b*) *Simpson* v. *Hartopp*, (1743) Willes, 512; *Gorton* v. *Falkner*, (1792) 4 T. R. 567; *Fenton* v. *Logan*, (1833) 9 Bing. 676; *Davis* v. *Aston*, (1845) 1 C. B. 746; *Keen* v. *Priest*, (1859) 4 H. & N. 236.

(*c*) *Fenton* v. *Logan*, (1833) 9 Bing. 676. The head note in this case is that an implement of trade is only privileged from distress if it be *in use*, and if there be no other distress on the premises. The term "in use" obviously cannot be taken to mean "in actual use," because if so the privilege is absolute. The case is badly reported, and the judgments are contradictory.

(*d*) *Keen* v. *Priest*, (1859) 4 H. & N. 236.

(*e*) *Ibid.*

(*f*) *Jenner* v. *Yolland*, (1818) 6 Price, 3.

(*g*) *Per Cur.*, *Nargett* v. *Nias*, (1859). 1 E. & E. p. 447.

(*h*) *Jenner* v. *Yolland*, *supra*.

(*i*) *Pigott* v. *Birtles*, (1836) 1 M. & W. 441. In such a case he may be liable for an excessive distress.

(*k*) (1857) 3 C. B. N. S. 244. In this case the decision did not go further than

rooms to the plaintiff with the condition that he should not distrain until after paying any rent due to his superior landlord. He distrained in breach of this condition, and the plaintiff recovered for an illegal distress. A contract not to distrain may be made with a stranger as well as with a tenant, and it will be a trespass against him if it is broken (*a*). Moreover, it is a wrongful act for the landlord to buy the distrained goods himself. It being essential in pursuance of a sale of chattels under 2 Will. & Mar. session 1, c. 5, for the purchaser to be a third party (*b*).

Distress by means of misrepresentation.

Again, if by misrepresentation a person has been induced to place his goods on land under the belief that they will there be safe from any claim for rent, the party guilty of the misrepresentation is estopped from distraining. In *Miles* v. *Furber* (*c*) the plaintiff had deposited goods in a warehouse the property of the defendant and, as the defendant led him to believe, in the defendant's occupation. In fact the warehouseman was the defendant's tenant. It was held that under such circumstances the latter could not take the plaintiff's goods as a distress for the rent of the warehouse.

Distress by taking advantage of wrongful act.

Again, a man cannot take advantage of his own wrong to distrain. Thus, in a general way the landlord of a field may distrain cattle which have accidentally strayed there; but if he is under a liability as against the adjoining owner to repair fences and cattle stray by reason of his breach of duty, he cannot distrain them unless the person to whom they belong fails to remove them after notice. But a rent-charger may distrain them without notice, since they are not there through any default on his part (*d*).

Authorised bailiff.

8. By 51 & 52 Vict. c. 21, s. 7, it is provided that "no person shall act as bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of a county court judge." Certificates may be given

that a right of distress might be postponed; leaving it open to argument on the language of the old authorities whether there could be a tenancy in which the right of distress was altogether excluded.

(*a*) *Horsford* v. *Webster*, (1835) 1 C. M. & R. 696.

(*b*) *Moore* v. *Singer Manufacturing Co.*, (1903) 2 K. B. 168.

(*c*) (1873) L. R. 8 Q. B. 77; see, too, *Fawkes* v. *Joyce*, (1689) 2 Vern. 129.

(*d*) *Kimp* v. *Cruwes*, (1695) 2 Lutw. fo. 1573; see *Poole* v. *Longuerill*, (1669) 2 Wm. Saund. p. 289.

generally or for a particular occasion, and the granting of them is regulated by rules made under the Act. "If any person not holding a certificate under this section shall levy a distress contrary to the provision of this Act the person so levying and any person who authorised him so to levy shall be guilty of a trespass" (*a*). In *Hogarth* v. *Jennings* (*b*) the managing director of an incorporated company who in person distrained for rent due to the company, was held to have acted as a bailiff, and, as he was not authorised to do so by a certificate in accordance with the section, to have been guilty of a trespass.

The above provision of s. 7 of the Law of Distress (Amendment) Act, 1888, has been held to apply not only as between landlords and tenants, but also as between landlords and third parties whose goods are on the demised premises (*c*).

Crown and foreign envoys.

9. There can be no distress against the Crown (*d*), nor against foreign ambassadors and their servants (*e*).

Companies in liquidation.

10. If a company under the Companies Act is in liquidation it cannot be distrained upon by its landlord for rent without the leave of the Court (*f*). But property of the company may be taken under a distress elsewhere than on its own premises for the rent of other people. Distress is only interfered with where there is the alternative remedy of proving in the liquidation (*g*).

Effect of unlawful entry.

Where the original entry of the distrainor is unlawful the whole of his subsequent proceedings are necessarily unlawful likewise, and he is liable for any goods which he may seize to the same extent as any other trespasser (*h*). However, a mere constructive seizure is not *per se* a cause of action. Where on any account such seizure is void, whether owing to the circumstances under which the entry was made or the character of the goods, the occupier is entitled to treat it as a nullity and his dominion over his property is nowise impaired (*i*). It would be

(*a*) *Perring & Co.* v. *Emerson*, L. T. Newspaper, Nov. 4th, 1905, p. 10.

(*b*) (1892) 1 Q. B. 907.

(*c*) *Perring & Co.* v. *Emerson*, (1905) 22 T. L. R. 14.

(*d*) *Secretary of State for War* v. *Wynne & Others*, L. T. Newspaper, Nov. 4th, 1905, p. 10.

(*e*) See Chitty on Prerogative, p. 376; 7 Ann. c. 12, s. 3. As to extent of privilege, see *Norello* v. *Toogood*, (1823) 1 B. & C. 554.

(*f*) 25 & 26 Vict. c. 89, ss. 85, 87, 163.

(*g*) *Re Lundy Granite Co.*, (1871) L. R. 6 Ch. 462.

(*h*) *Attack* v. *Bramwell*, (1863) 3 B. & S. 520. As to what amounts to a seizure, see *Cramer* v. *Mott*, (1870) L. R. 5 Q. B. 357.

(*i*) *Beck* v. *Denbeigh*, (1860) 29 L. J.

different if there were an impounding, because thereby the owner is deprived of his goods, although they be not physically interfered with. He cannot deal with them, however unlawful the distress, without being liable for pound breach (*a*).

Trespass after entry.

If a distrainor's entry is lawful but he is guilty of a trespass subsequently by seizing goods whether conditionally or absolutely privileged, he is only liable to the extent of that which is unlawfully seized, and the doctrine of trespass *ab initio* does not extend so far as to make the whole proceedings bad (*b*). If a distress is made where no rent at all is due the distrainor is liable for double damages (*c*).

Irregular distress.

An action for an irregular distress lies when any unlawful act or breach of duty is committed by the distrainor subsequently to the seizure. Formerly his liability in respect of such matters rested on the doctrine of trespass *ab initio*, by which a subsequent abuse of a right of entry given by the law made the original entry unlawful (*d*). However, by 11 Geo. II. c. 19, s. 19, where a distress is made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainor a trespasser *ab initio*, but the party grieved may recover full satisfaction for the special damage sustained thereby, and no more, in a special action of trespass or on the case. By s. 20 of the Act the distrainor may tender amends, and if the amends are sufficient he is entitled to a verdict, such verdict carrying with it double costs against the distrainee (*e*).

Tender after seizure.

Impounding.

In the first place the distrainor is bound to return the goods seized on demand, if before impounding the rent actually due and the expenses of the distress are tendered to him (*f*). He is

C. P. 273 ; *Spice* v. *Webb*, (1838) 2 Jur. 943 ; and cp. *Swann* v. *Earl of Falmouth*, (1828) 8 B. & C. 456. It is otherwise if the seizure is merely excessive. See below, p. 314.

(*a*) See below, p. 317.

(*b*) *Harrey* v. *Pocock*, (1843) 11 M. & W. 740.

(*c*) 2 Will. & Mar. c. 5, s. 5 ; see *Masters* v. *Farris*, (1845) 1 C. B. 715. As to Costs, see *Avery* v. *Wood*, (1891) 3 Ch. 115, C. A.

(*d*) *Six Carpenters' case*, (1610) 8 Rep. 146a.

(*e*) 11 Geo. II. c. 19, s. 21.

(*f*) See above, p. 287 ; *Evans* v. *Elliot*, (1836) 5 A. & E. 142 ; *Long* v. *Warburton*, (1858) E. B. & E. 507. The expenses are now regulated by the rules made under 51 & 52 Vict. c. 21, s. 8, whereby two scales are provided, one where the rent demanded and due is over, the other where it is under, 20*l*.

also by the common law bound with reasonable speed to remove the goods taken from the premises to a pound (*a*). If he remains longer than is necessary, it is a trespass. The goods must be kept together and not taken to different pounds (*b*). The pound must be a fit and proper one for the safe reception and custody of the things distrained, or otherwise an action lies for any damage which they may sustain (*c*). When live stock are impounded, the distrainor is by statute bound to provide them with food and water, and has a power of sale to recover the expense of so doing (*d*).

Statutory impounding.

In distresses for rent the common law method of impounding is practically superseded by 11 Geo. II. c. 19, s. 10, which empowers distrainors to impound or otherwise secure the distress on such part of the premises as shall be most fit and convenient.

Growing crops.

Growing crops distrained under this statute (s. 8) must be harvested when ripe and stored on the premises if there is any proper place for so doing, and if not as near as may be, and notice of the place must be given (s. 9), and straw, hay and corn distrained under 2 Will. and Mar. c. 5, s. 3, must be impounded on the very spot where it is found.

Impounding on premises.

It is difficult to define what is an impounding on the premises

(*a*) *Griffin* v. *Scott*, (1727) Lord Raym. 1424; *Peppercorn* v. *Hofman*, (1842) 9 M. & W. 618.

(*b*) 1 & 2 Phil. & Mar. c. 12, which Act provides also against driving to distant pounds, and imposes penal damages and a fine.

(*c*) *Vaspor* v. *Edwards*, (1701) 12 Mod. 658; *Bignell* v. *Clerk*, (1860) 5 H. & N. 485; *Wilder* v. *Speer*, (1838) 8 A. & E. 547.

(*d*) 12 & 13 Vict. c. 92, s. 5; 17 & 18 Vict c. 60, s. 1; see *Layton* v. *Hurry*, (1846) 8 Q. B. 811. Before these statutes there was an important distinction between pounds overt and covert. A pound covert was a private pound to which the owner of the distress had no lawful access, and therefore the party impounding was bound to feed and water the cattle which he placed in such pound. A pound overt might be either public or private, but in case of such pound the person impounding was not bound to supply food and water, since the owner might do so himself. The only difference between a public pound and a private pound overt was that in case of the former, the distrainor was not bound to give notice (see Gilbert on Distress, 4th ed. p. 61), because it was the natural place at which the owner would go to look for his beasts. "Be the pound common or not, it is the pound of him that uses it for that time, and the law does not require men to put the distress in the common pound but only that it be put in a pound overt, or be fed at the peril of the distrainor and taken care of by him; and common pounds are either by custom, tenure or agreement among the inhabitants of a vill or manor and not by common law." *Per* Holt, C.J., *Vaspor* v. *Edwards*, (1701) 12 Mod. p. 664. See, too, Co. Litt. p. 47b; Com. Dig. Distress D. 1.

within the meaning of 11 Geo. II. c. 19, s. 10. It would seem, however, that it is enough if either after or at the time of the seizure the distrainor gives the distrainee notice that he has impounded certain goods on the premises. It is not absolutely requisite that anyone should be left in possession. For although if a man quits possession after seizing and before impounding, that is an abandonment (*a*), yet after the impounding the custody of the law supersedes the physical custody (*b*).

The distrainor has no right to impound the goods so as to interfere more than is reasonably requisite with the possession of the occupier, and it would seem doubtful whether under any circumstances can the latter be altogether excluded from the premises (*c*). There is no obligation on the distrainor to impound on the premises (*d*).

Tender after impounding.

The detention after impounding is not of itself a cause of action though the distress be unlawful, for the goods are in the custody of the law (*e*), but it may aggravate the damages if the impounding is illegal, just as imprisonment by the act of a magistrate may be considered as one of the consequences of a malicious prosecution. Consequently a pound-keeper who does nothing more than detain is not answerable under any circumstances to the party distrained on (*f*). So an impounding is not rendered unlawful by a subsequent tender of all that is due, whether the impounding be at common law or under 11 Geo. II.

(*a*) *Per* Holt, C.J., *Dod* v. *Monger*, (1704) 6 Mod. p. 216.

(*b*) *Jones* v. *Biernstein*, (1900) 1 Q. B. 100; *Swann* v. *Earl of Falmouth*, (1828) 8 B. & C. 456; *Thomas* v. *Harries*, (1840) 1 M. & G. 695. However, in *Washborn* v. *Black*, (1774) 11 East, 405, n., it was said that except by the assent of the tenant the goods ought to be removed to some definite part of the premises in order to constitute an impounding. See, too, *Tennant* v. *Field*, (1857) 8 E. & B. 336. Maule, J., who dissented in *Thomas* v. *Harries*, (1840) said that a notice could not make an impounding. It would seem, however, that the notice is important both as evidencing the intention to impound, and giving the distrainee the knowledge which he would otherwise acquire from the evidence of his senses. He has a right to know whether his goods are impounded or not, for his whole legal position is affected thereby. In *Wood* v. *Nunn*, (1828) 5 Bing. 10, the landlord put his hand on a chattel, and said he would not suffer it to be removed till his rent was paid and it was held that the chattel was thereby in the custody of the law. But it seems doubtful whether these words were used strictly and whether the Court thought that it was impounded or merely seized.

(*c*) *Woods* v. *Durrant*, (1846) 16 M. & W. 149.

(*d*) *Per* Pollock, C.B., *Smith* v. *Ashforth*, (1860) 29 L. J. Ex. p. 260.

(*e*) Co Litt. 47b.

(*f*) *Badken* v. *Powell*, (1776) 2 Cowp. 476.

c. 19, s. 10 (*a*). It has been held, however, in a case of distress *damage feasant* that if a sufficient tender is made while the goods are in a private pound the tender is in time (*b*). It may be thought questionable how far this case is consistent with the other authorities. If impounding on the premises makes a tender too late it would seem that impounding off the premises is an *à fortiori* case. The ground given for the decision is that goods in a private pound are not in the custody of the law, which is much the same thing as saying that a private pound is no pound at all (*c*).

Tender accepted.

If, however, the distrainor after impounding thinks proper to accept a tender, a refusal to give up the goods or any subsequent dealing with them is a conversion or a trespass (*d*).

Abuse of thing distrained.

The distrainor has only a right to keep the thing as it is when taken. If he otherwise deals with it, it is an abuse of the distress and a trespass (*e*). Formerly this rule was carried to very great length, and it was said to be a trespass to milk a distrained cow (*f*), and in one case it appears to have been held that a distrainor became a trespasser by cording a trunk for its better security (*g*). The better opinion, however, appears to be that it is lawful to do anything for the better preservation of the chattel which cannot possibly injure the owner. In *Duncomb* v. *Reeve* (*h*) the plaintiff alleged a trespass by tanning certain raw hides, and the defendants pleaded that they tanned them because otherwise they would have rotted, and it was held an ill plea "because thereby the property is *quasi* altered and the marks to know them again are taken from the owner so as he cannot have it again, and

(*a*) *Thomas* v. *Harries*, (1840) 1 M. & G. 695; *Ladd* v. *Thomas*, (1840) 12 A. & E. 117. In the former case, Maule, J., dissented, holding that while the goods were on the premises a tender was in time, and that the cases on common law impounding did not apply. Erle, J., expressed his approval of this view in *Tennant* v. *Field*, (1857) 8 E. & B. p. 344. As will be seen, a tender after impounding may make a subsequent sale unlawful. See below, p. 311.

(*b*) *Green* v. *Duckett*, (1879) 11 Q. B. D. 275.

(*c*) See above p. 306, note (*d*), and the authorities there referred to. An action lies for pound breach from a private pound. Fitz. N. B. p. 100.

(*d*) *West* v. *Nibbs*, (1847) 4 C. B. 172.

(*e*) Under some circumstances it may amount to an abandonment of the distress. See below, p. 317; *Smith* v. *Wright*, (1861) 6 H. & N. 821.

(*f*) Vin. Ab. Distress, P. 8.

(*g*) *Per* Twysden, J., *Welsh* v. *Bell*, (1669) 1 Vent. p. 37.

(*h*) (1599) Cro. Eliz. 783. See, too, *Bagshawe* v. *Goward*, (1605) Cro. Jac. 147.

although one may in some cases meddle with and use a distress where it is for the owner's benefit, as where one distrains armour he may cause them to be scoured to avoid rust, so if one distrains raw cloth he may caused it to be fulled, for that is for the owner's benefit. But here this tanning is not for his benefit." However, considerations of this sort cannot well arise, since 11 Geo. II. c. 19, s. 19, has made some real damage necessary to a cause of action for any wrongful act subsequent to seizure. It is still, however, a rule of law that perishable goods, such as the carcases of recently-slaughtered animals, are privileged from distress—upon the ground that they are commodities which cannot be restored in the same plight and condition as that in which they were when taken (*a*).

Power of sale.

In all cases of distress for rent there is by statute a power of sale.

By 2 Will. & Mar. c. 5, s. 2, "where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof, with the cause of such taking, left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security, to be given to the sheriff according to the law, then in such case after such distress and notice aforesaid, and the expiration of the said five days, the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised by two appraisers, to appraise the same truly according to the best of their understanding; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same towards satisfaction for the rent for which the said goods and chattels shall be distrained and the charges for such distress, appraisement and sale" (*b*). As already stated, however, the distrainor may not himself purchase the goods (*c*).

By 4 Geo. II. c. 28, s. 5, this remedy is extended to cases of distress for rent seck and rent charges.

(*a*) *Morley* v. *Pincombe*, (1848) 2 Ex. 101.

(*b*) Certain omitted words are repealed by 35 & 36 Vict. c. 92, s. 13. For existing procedure in replevin, see above, p. 256.

(*c*) *Moore* v. *Singer Manufacturing Co.*, (1903) 2 K. B. 168.

It exists where goods are impounded on the premises under 11 Geo. II. c. 19, s. 10. However, by 51 & 52 Vict. c. 21, s. 5, no appraisement is now required, except where the tenant or owner of the goods by writing requires it to be made, and for the purposes of sale, the goods and chattels distrained shall, at the request in writing of the tenant or owner "be removed to a public auction-room or some other fit and proper place specified in such request and there be sold." The expenses of such appraisement and the expense and risk of such removal are to be borne by the party making the request. By the same Act (*a*) the time for holding the goods before sale is extended to a period not exceeding fifteen days, if the tenant or owner of the goods so requests in writing and gives security for any additional expense that may be caused. They may be sold at any time previously at the written request or with the written consent of the tenant or owner.

Distrainor need not sell.

The distrainor is not bound to exercise the power of sale given him by these provisions, the words "shall and may" being permissive only (*b*). However, corn, hay, straw, growing crops and cattle found depasturing on commons must, in all cases, be sold, since the method of dealing with them is directed by the very statutes making them distrainable (*c*).

Exceptions.

If the option to sell is exercised all the conditions precedent laid down by the statute must be strictly fulfilled, otherwise the distress will become irregular. There must be, in the first place, a proper notice of the distress, with the cause of the taking. It must inform the tenant what goods are taken and what is the rent in arrear (*d*). A general notice of seizure of all the goods

(*a*) s. 6.

(*b*) *Lear* v. *Edmonds*, (1817) 1 B. & Ald. 157; *Hudd* v. *Ravenor*, (1821) 2 B. & B. 662; *Philpott* v. *Lehain*, (1877) 35 L. T. N. S. 855.

(*c*) 2 Will. & Mar. c. 5, s. 3; 11 Geo. II. c. 19, s. 8; *per* Parke, B., *Piggott* v. *Birtles*, (1836) 1 M. & W. p. 448.

(*d*) *Per Cur. Kerby* v. *Harding*, (1851) 6 Ex. p. 241. The statute allows a sale where goods are taken for "rent due." The rent due, therefore, must be the cause of the taking and must be truly stated. *Tancred* v. *Leyland*, (1851) 16 Q. B. 669), which shows that a distress need not be excessive merely because too much is claimed, is not inconsistent with this view, for there the giving of a wrong notice under the statute was not alleged. The absence or incorrectness of notice will not make the distress void or excessive, but it will make the sale irregular (*per Cur. Trent* v. *Hunt*), (1853) 9 Ex. p. 20). The date when the rent fell due need not, it seems, be given (*Moss* v. *Gallimore*, (1779) 1 Doug. 279).

on the premises is sufficient (*a*). But where the notice was of certain specified articles and everything else on the premises that might be required to satisfy the rent, it was held bad because it left it uncertain what goods were taken and what not (*b*).

How served.

The notice in ordinary cases must be "left at the chief mansion-house or other most notorious place on the premises," and therefore it must be in writing, because a verbal notice cannot be left (*c*). Where, however, the goods of a stranger are distrained, notice may be given to him instead of to the tenant, and in such a case the words above quoted do not apply (*d*).

The sale, except by written consent, must not take place until after the whole statutory period has elapsed. Thus, in the ordinary case under the principal Act, there must be five days, not counting the day on which notice is given (*e*), and on the sixth day, the sale is lawful, unless meantime the goods have been replevied or a tender of the rent and expenses has been made, in which case the sale is irregular (*f*). After this time it is too late to tender, but so long as the goods remain unsold the property in them is not altered, and they may be replevied (*g*).

Time of sale of crops.

By the express terms of 11 Geo. II. c. 19, ss. 8, 9, growing crops are not to be sold until they are ripe and gathered, and up to that time a tender may be made.

Appraisement.

Where appraisement is necessary it must be made by independent persons, and therefore neither the distrainor nor his agent in the distress are fit for the purpose (*h*). It is not necessary that the appraisers employed should be professional, but they must be reasonably competent persons (*i*).

Sale on premises.

If the goods are impounded on the premises under 11 Geo. II. c. 19, s. 10, by the terms of the section a reasonable time after the appointed interval is allowed for the conduct of the sale

Time allowed.

(*a*) *Wakeman* v. *Lindsey*, (1849) 14 Q. B. 625.

(*b*) *Kerby* v. *Harding*, (1851) 6 Ex. 234.

(*c*) *Wilson* v. *Nightingale*, (1846) 8 Q. B. 1034.

(*d*) *Walter* v. *Rumbal*, (1695) Lord Raym. 53.

(*e*) *Robinson* v. *Waddington*, (1849) 13 Q. B. 753.

(*f*) *Johnson* v. *Upham*, (1859) 2 E. & E. 250; overruling *Ellis* v. *Taylor*, (1841) 8 M. & W. 415.

(*g*) *Jacob* v. *King*, (1814) 5 Taunt. 451.

(*h*) *Per* Best, C.J., *Lyon* v. *Weldon*, (1824) 2 Bing. p. 336.

(*i*) *Roden* v. *Eyton*, (1848) 6 C. B. 427.

and the removal of the goods, but if such time is exceeded the unnecessary interference with the possession of the tenant is a trespass (*a*).

Sale under value.

The goods must be sold at the best price, therefore the distrainor is answerable for the proper and reasonable conduct of the sale (*b*). If he has distrained growing crops, which by the terms of the tenancy are to be consumed on the premises, he must sell at market and not at consuming price (*c*). He is not bound to postpone the sale of goods conditionally privileged until he has seen whether he can realise sufficient without them (*d*). Being the seller of the goods he cannot likewise be the buyer, and if he endeavours to take them at a valuation the transaction is a nullity (*e*).

Overplus

It was formerly the duty of the distrainor, if there was any overplus at the sale, to leave it in the hands of the sheriff, under-sheriff or constable who aided and assisted in the distress, and if this was not done an action lay for the breach of duty (*f*). By 35 & 36 Vict. c. 92, s. 13, the aid and assistance of such officers is not required, but no provision is made for the overplus. It is to be presumed that the owner of the goods can sue for it in an action for money had and received (*g*).

Waiving irregularity.

It is to be observed that throughout all the proceedings in a distress the maxim "*Volenti non fit injuria*" applies. A man cannot recover in trespass for any act done with his leave and licence nor for any other irregularity which has been committed with his assent (*h*).

Special damage.

In an action for an irregular distress the plaintiff can only recover satisfaction for the special damage occasioned by the irregularity, and if there is no damage there is no cause of

(*a*) *Pitt* v. *Shew*, (1821) 4 B. & Ald. 206; *Winterbourne* v. *Morgan*, (1809) 11 East, 395.

(*b*) See *Poynter* v. *Buckley*, (1833) 5 C. & P. 512.

(*c*) *Ridgway* v. *Lord Stafford*, (1851) 6 Ex. 404; *Hawkins* v. *Walrond*, (1876) 1 C. P. D. 280.

(*d*) *Jenner* v. *Yolland*, (1818) 6 Price, 3.

(*e*) *King* v. *England*, (1864) 4 B. & S. 782; *Moore* v. *Singer Manufacturing Co.*, (1903) 2 K. B. 168.

(*f*) 2 Will. & Mar. c. 5, s. 2.

(*g*) See on this point *Evans* v. *Wright*, (1857) 2 H. & N. 527.

(*h*) *Washborn* v. *Black*, (1774) 11 East, 405, n.; *Tennant* v. *Field*, (1857) 8 E. & B. 336; *Bishop* v. *Bryant*, (1834) 6 C. & P. 484. The proviso, however, in 51 & 52 Vict. c. 21, s. 6, which speaks of a written consent, would seem in the case provided for to exclude a mere verbal assent.

action (*a*). It would seem, however, that where the injury alleged is a pure trespass, as for example an unreasonable disturbance of the plaintiff's possession of the premises, it is not intended that he shall be put to prove some definite pecuniary loss. The Act contemplates that trespass may be brought in fitting cases for an irregularity (*b*).

Damage for irregular sale.

Where the action is brought for an irregular sale it is enough to prove that the conditions prescribed by the act were in some respect broken and that the goods realised less than their value, but it is not necessary to prove that the damage was the direct consequence of the breach of duty. If, for instance, goods are not appraised, the failure to appraise may not cause them to be sold less favourably, but it will make the sale irregular, and if such sale is at an undervalue it is the cause of the loss (*c*). The general rule is that in such a case the party is entitled to recover the true value of the goods, less the proper expenses of the sale and the rent actually satisfied (*d*).

Damages where goods belong to stranger.

If the owner of the goods is not the person who is liable for the rent it is obvious that the measure of damages in an irregular distress may be different, for the satisfaction of the rent is no benefit to him and therefore cannot be taken into consideration as a diminution of damage. In *Sharpe* v. *Fowle* (*e*), the plaintiff was a lodger. The defendant, the superior landlord, distrained and sold within the five days, and the plaintiff recovered the whole value of his goods. The ground of the decision was that the premature action of the landlord interfered with the lodger's right of serving a declaration under the Lodgers' Goods Protection Act, 1871. This consideration would not apply to a complete stranger, and if his goods were sold within the five days it is apprehended that he could not recover unless he showed that he had suffered actual damage from the landlord's irregularity.

Effect of irregular sale on property.

However irregular a sale may be it is not a mere nullity, and will avail to pass the property. Therefore the tenant or owner of the goods cannot follow them into the hands of third parties

(*a*) 11 Geo. II. c. 19, s. 19; *Rodgers* v. *Parker*, (1856) 18 C. B. 112.

(*b*) *Brown* v. *Sherill*, (1834) 2 A. & E. 138.

(*c*) *Per* Parke, B., *Knotts* v. *Curtis*, (1832) 5 C. & P. p. 323. See, too, *Sharpe* v. *Fowle*, (1884) 12 Q. B. D. 385.

(*d*) *Biggins* v. *Goode*, (1832) 2 C. & J. 364; *Knotts* v. *Curtis*, *supra*.

(*e*) (1884) 12 Q. B. D. 385.

or recover of the distrainor in trover (*a*). It was indeed held in *Owen* v. *Legh* (*b*) that a mere sale of growing crops unaccompanied by any dealing with them was a mere nullity and afforded no ground of action, but this decision seems inconsistent with the subsequent cases. Where, however, the landlord took the goods distrained at a valuation, it was held that, there being no sale at all, no property passed. (*c*).

Broker's charges.

By 57 Geo. III. c. 93, s. 6, every broker or person levying a distress is bound to give a copy of the charges to the person whose goods are distrained, but this does not affect the person who causes the distress to be levied, nor does it make the distress irregular (*d*). Where, however, a bailiff in distraining has retained, out of the amount realised, an unreasonable charge for costs in connection with the distress, the remedy of the distrainee is not confined to the statutory application prescribed under s. 2 of the Distress (Costs) Act, 1817. The County Court having jurisdiction to try an action in which repayment is claimed of so much of the charge as is unreasonable (*e*).

Excessive distress.

An excessive distress is a breach of the duty imposed by 52 Henry III. c. 4 (which is declaratory of the common law), enacting that distresses shall be reasonable and not too great.

Excessive claim.

Merely to distrain under an excessive claim is not necessarily an excessive distress. An action nevertheless lies if the party distrained on is thereby put under a difficulty in his replevin (*f*).

Excessive seizure.

The ordinary kind of excessive distress, however, consists in the seizure of an amount of goods which is altogether out of proportion with the debt really to be satisfied. It will be, of course, an aggravation of the damage if there be subsequently an excessive sale. A mere constructive seizure will suffice to give a cause of action, because not being wholly unlawful or a trespass (*g*) the tenant cannot treat it as a nullity, and his dominion is thereby

(*a*) *Wallace* v. *King*, (1788) 1 H. Bl. 13; *Lyon* v. *Weldon*, (1824) 2 Bing. 334; *Rodgers* v. *Parker*, (1856) 18 C. B. 112.

(*b*) (1820) 3 B. & Ald. 470.

(*c*) *King* v. *England*, (1864) 4 B. & S. 782.

(*d*) *Hart* v. *Leach*, (1836) 1 M. & W. 560. As to amount of charges, see Distress for Rent Rules, and *Headland* v. *Coster*, (1905) 1 K. B. 219, C. A.

(*e*) *Rex* v. *Philbrick & Morey, Ex parte Edwards*, (1905) 2 K. B. 108.

(*f*) *Tancred* v. *Leyland*, (1851) 16 Q. B. 669. See above, p. 310, note (*d*).

(*g*) *Hutchins* v. *Chambers*, (1758) 1 Burr. 579.

impaired (*a*), and it makes no difference that he has, in fact, enjoyed a permissive use of the property (*b*).

A distrainor is not guilty of an excessive distress merely by slightly exceeding the amount requisite. "He is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it" (*c*). Thus in the time of Edward III. (1327—77) distresses of forty sheep for 2*d*., and sixteen oxen for 9*d*. were held excessive (*d*). In *Roden* v. *Eyton* (*e*), the property taken exceeded the amount due by 50 per cent., and it was held not excessive. If there is but one thing to be distrained it may be taken, however excessive its value, since otherwise the distress would be altogether defeated (*f*). It seems to have been at one time thought that no action could lie for an excessive distress if the goods fairly sold did not realise the amount of the rent (*g*), their value in the sale being their value to the distrainor; but it has been held that the party distrained on is not thereby absolutely concluded. "You cannot make the sale under the distress a test of value; if so, probably no distress could be deemed excessive" (*h*).

If the distrainor goes on selling after he has realised sufficient it is conceived that this would be a trespass and not merely an excess (*i*).

Excess when things distrainable by statute.

Things distrainable only by statute are within the protection of 52 Henry III. c. 4, just as much as things distrainable by the common law (*k*).

Interest in goods to support action.

If chattels are taken under an excessive distress an action may be maintained by anyone who has such an interest in them as

(*a*) *Chandler* v. *Doulton*, (1865) 3 H. & C. 553. It is otherwise where the seizure would be a trespass. See above, p. 305.

(*b*) *Bayliss* v. *Fisher*, (1830) 7 Bing. 153.

(*c*) *Per* Bayley. J., *Willoughby* v. *Backhouse*, (1824) 2 B. & C. p. 823.

(*d*) Ro. Abr. 674.

(*e*) (1848) 6 C. B. 427.

(*f*) 2 Inst. p. 107; *Arenell* v. *Croker*, (1828) M. & M. 172; *Field* v. *Mitchell*, (1807) 6 Esp. 71.

(*g*) *Wells* v. *Moody*, (1835) 7 C. & P. 59.

(*h*) *Per* Martin, B., *Smith* v. *Ashforth*, (1860) 29 L. J. Ex. p. 260. The decision as to whether a particular distress is excessive or not, being one of fact, is apparently for the jury (*Smith* v. *Ashforth*, *supra*).

(*i*) This is so in the case of an execution (*Gawler* v. *Chaplin*, (1848) 2 Ex. 503).

(*k*) *Piggott* v. *Birtles*, (1836) 1 M. & W. 441.

would support an action of trover (*a*). If, in an excessive distress the goods of the tenant and a stranger are taken together, the latter has a right of action (*b*).

It has, however, been held (in an action for damages for illegal and excessive seizure of distress for rates), that the wrongful act of an assistant overseer does not relate back to the overseers, on whose behalf he purported to act, so as to render them liable for his tort (*c*).

Interference with distress.

It remains to point out the remedies which the law gives where the right of distress is improperly interfered with.

Fraudulent removal.

The rights of landlords to follow goods in case of fraudulent removal have already been dealt with. An action of debt also lies for double the value of the goods against all who are parties to such fraudulent removal with knowledge of the fraud (*d*).

Preventing distress.

If a person coming to make a distress is impeded and obstructed so that he is thereby prevented from seizing, the intending distrainor has a right of action for the damage thereby caused (*e*).

Rescue and pound breach.

If after goods are seized and before impounding they are wrongfully taken out of the bailiff's possession, the distrainor may bring an action of rescue, but if they are taken out of the pound the form of action is pound breach. These remedies existed at common law in favour of any party distraining. By statute (*f*) upon any pound breach or *rescous* of goods or chattels distrained for rent the persons grieved thereby have a right of action for treble damages and treble costs (*g*) without proof of any special damage being suffered by them (*h*), not only against the parties proved to have been concerned in the act, but also against the owners of the goods distrained in case they are proved to have subsequently come into their possession. A rescue may either be in deed by an actual taking, or in law as where cattle on their way to the pound escape and come into the hands of their owner. If he refuse to deliver them, this is a rescue in law (*i*). If the

(*a*) *Fell* v. *Whittaker*, (1871) L. R. 7 Q. B. 120.

(*b*) *Fisher* v. *Algar*, (1826) 2 C. & P. 374.

(*c*) *Baker and Wife* v. *Wicks and others*, (1904) 1 K. B. 743.

(*d*) See above, pp. 291–2. 11 Geo. II. c. 19, s. See *Brooke* v. *Noakes*, (1828) 8 B. & C. 537.

(*e*) Fitz. N. B. p. 102.

(*f*) 2 Will. & Mar. c. 5, s. 4.

(*g*) *Lawson* v. *Story*, (1694) 1 Lord Raym. 19.

(*h*) *Kemp* v. *Christmas*, (1898) 79 L. T. 233.

(*i*) Co. Litt. p. 161a.

seizure on any ground is illegal the owner may lawfully rescue his goods. He has the same right of recaption as against any other trespasser (*a*). If between seizure and impounding the party making the distress voluntarily quits actual possession this is an abandonment. The owner is restored to his full dominion, and anything which he may do with the goods is no rescue (*b*).

When rescue lawful.

When the impounding is once complete the goods are in the custody of the law, and whether the original taking was lawful or not it is a pound breach to remove them from the pound (*c*). It is difficult, however, assuming that the distress be illegal, to see what the damage can be, and no action lies under the statute because there is no party grieved (*d*). If, however, a pound be left open the owner of goods improperly distrained may, it seems, come and retake them, for there is no real impounding (*e*). After abandonment there can be no pound breach because the distress is thereby determined. It has been already pointed out that in impounding a continuance of possession is not necessary, but if a man is left in possession his subsequent withdrawal may be evidence of an intention to abandon (*f*).

Lawful retaking after impounding.

If a distrainor abuses the distress when impounded the owner may be entitled to interfere and resume possession for the protection of his property. It is not, however, for every abuse that he is allowed to take this course. The mere fact of a distrainor making himself a trespasser *ab initio* at common law only puts him in the same position as though the original taking were illegal; and, as has been seen, the illegality of the distress does not justify the breaking of the pound. It would seem that to justify a retaking the abuse of the distress must be so great as to amount to an abandonment or forfeiture of the distrainor's right, thereby putting an end to the impounding (*g*).

Where distress abused.

(*a*) Co. Litt. p. 47b, p. 160b.

(*b*) *Per* Holt, C.J., *Dod* v. *Monger*, (1704) 6 Mod. p. 216; *Knowles* v. *Blake*, (1829) 5 Bing. 499; Com. Dig. Distress D. 1.

(*c*) Co. Litt. p. 47b; *Parret Navigation Co.* v. *Stringer*, (1840) 6 M. & W. 564.

(*d*) *Berry* v. *Huckstable*, (1850) 14 Jur. 718.

(*e*) Co. Litt. p. 47b.

(*f*) See above, p. 294. *Swann* v. *Earl of Falmouth*, (1828) 8 B. & C. 456; cp. *Bannister* v. *Hyde*, (1860) 2 E. & E. 627; see, too, *Kerby* v. *Harding*, (1851) 6 Ex. 234.

(*g*) *Smith* v. *Wright*, (1861) 6 H. & N. 821.

Where no notice of impounding.

It might possibly happen that goods impounded on the premises might be removed by a purchaser from the distrainee without any notice of the impounding. It is submitted that in such a case the innocent purchaser might not be liable under the statute which gives treble damages against the "offender" (*a*).

Property of distrainor.

When the goods are in the pound the distrainor has no possession or right of possession, since they are in the custody of the law. The consequence is that in case of pound breach his remedy is confined to the immediate wrong-doers. He cannot sue in trover any third person into whose hands the goods subsequently came. The case might be supposed to be different where a rescue takes place before impounding, for then the distrainor has an actual possession, coupled—in case of distress for rent—with a power of sale, which might seem a sufficient special property to enable him to follow the goods. Authority, however, is against this view, and the distrainor must be considered as standing on a peculiar footing, and not enjoying the rights ordinarily incident to possession (*b*).

If, however, goods distrained are rescued or taken out of the pound, the distrainor has a right of recaption on a fresh pursuit (*c*). As is elsewhere pointed out, this right confers a licence in law to go on the land to which the goods have been removed, but not to enter forcibly (*d*).

Distress *damage feasant.*

If a man find the chattel of another unlawfully on his land and doing damage, he may seize and detain it impounded, in order to compel the owner of the offending chattel to make compensation for the damage done. This right is known as distress *damage feasant.* The manner of the exercise of this right is regulated by the same rules of the common law as in the case of distress for rent, subject to the modifications hereafter pointed out. With regard to the statute law, 2 Will. & Mar. c. 5, and 11 Geo. II.

(*a*) But a man may be an innocent "offender" against the Copyright Acts. See Ch. XXI.

(*b*) See 2 Wm. Saund. p. 47 b *in not.*; *Rex* v. *Cotton*, (1751) Parker 112; *Turner* v. *Ford*, (1846) 15 M. & W. 212. *Per* Blackburn, J., *King* v. *England*, (1864) 4 B. & S. p. 785. It was said, however, in *Symons* v. *Hearson*, (1823) 12 Price, p. 386, that a distrainor might bring trespass in respect of his actual possession if goods were rescued.

(*c*) *Rich* v. *Woolley*, (1831) 7 Bing. 651; see, too, *Wood* v. *Nunn*, (1828) 5 Bing. 10. As to additional rights when accompanied by a constable, see 11 Geo. II. c. 19, s. 7.

(*d*) *Patrick* v. *Colerick*, (1838) 3 M. & W. 483. See below, pp. 345-6.

c. 19, have no application to distress *damage feasant*. In this kind of distress, therefore, there is no power of sale, and the doctrine of trespass *ab initio* fully applies.

What may be distrained.

Distress *damage feasant* is usually taken of straying cattle, but it may be equally well taken of any other chattel which unlawfully encumbers and damages a man's land (*a*). There is no privilege from distress *damage feasant*, "it being but natural justice that whatever doth the injury should be a pledge to make compensation for it" (*b*). A single exception exists in the case of things in actual use. This is for the sake of avoiding breaches of the peace (*c*), although it has been said, but apparently without sufficient authority, that a horse may be led to the pound with the rider on him (*d*). The well-known case of Mr. Pickwick in the wheelbarrow may perhaps be cited in support of the same doctrine.

Who may distrain.

The distress being a remedy for trespass, the right can, as a rule, be exercised only by a person who has a sufficient possession of land to entitle him to maintain an action of trespass (*e*). A commoner, however, may distrain beasts which are grazing on his common without any colour of right, but not where there is merely a case of surcharging (*f*). But a power of distraint accrues, to the person in possession, when tenants in common by mutual agreement severally exercise, during a specific period, complete dominion over the whole of the land (*g*).

No trespass, no distress.

Where there is no trespass there is no right of distress. Thus, if cattle on being driven along a road stray on to the unfenced land adjoining, without default on the part of their drivers, they cannot be distrained until there has been a reasonable opportunity of driving them back again (*h*): and on the other hand, if cattle

(*a*) *Ambergate, &c., R. Co. v. Midland R. Co.*, (1853) 2 E. & B. 793.

(*b*) Gilbert on Distress, 4th ed., p. 49.

(*c*) *Storey* v. *Robinson*, (1795) 6 T. R. 138; *Field* v. *Adames*, (1840) 12 A. & E. 649.

(*d*) Gilbert on Distress, 4th ed., p. 49.

(*e*) *Burt* v. *Moore*, (1793) 5 T. R. 329; *Churchill* v. *Evans*, (1809) 1 Taunt. 529.

(*f*) Anon., (1770) 3 Wils. 126; *Hull* v. *Harding*, (1768) 4 Burr. 2426; *Cape* v. *Scott*, (1874) L. R. 9 Q. B. 266. See *Kentick* v. *Pargiter*, (1608) Cro. Jac. 208.

(*g*) *Whiteman* v. *King*, (1791) 2 H. Bl. 4.

(*h*) *Goodwyn* v. *Chereley*, (1859) 4 H. & N. 631. Itwas held in this case that the reasonableness of the time must be estimated with regard to all the circumstances, and that if part of a drove strayed, the drover was not bound at once to go after them, but might first take proper precautions for the safety of the rest.

are not lawfully on the road they may be distrained directly they stray from it to the adjoining land (*a*). In *Singleton* v. *Williamson* (*b*), the defendant owned a close adjoining a close of the plaintiff's, and was under a liability to repair the fence between the two closes. The fence being insufficient, the plaintiff's cattle strayed through it, and ultimately broke through another fence into a third field also belonging to the defendant. He there distrained them, and it was held that the distress was unlawful, inasmuch as the damage of which he complained was the natural consequence of his own breach of duty.

Actual damage.

To justify the distress there must not only be a trespass but also actual damage, as where cattle tread down and devour grass or corn (*c*). If an animal strays into a paved yard the mere fact of its presence does not make it distrainable (*d*). The distress can only be made during the continuance of the trespass. And the distrainor must be actually in the *locus in quo* (*e*) as the animal cannot be followed off the land; it must be seized then and there (*f*), and it would seem that even if it is still on the land it is not distrainable unless actually doing damage or likely to do damage (*g*). Accordingly if an animal trespasses on two occasions and on the second is taken for a trespass, the impounding can only be to answer for the damage done at the time, and not for that done previously (*h*).

Distress must be at time of trespass.

Chattel only distrainable for its own damage.

If a herd of cattle trespass, each is only distrainable for its own damage; the injured party cannot detain one in respect of the mischief which the whole herd have done (*i*). It follows that there can be no such thing as an excessive distress *damage feasant*, inasmuch as there is no choice as to what shall be distrained.

For what damage animals are distrainable.

In a modern case (*k*) it was held that the damage for which

(*a*) *Doraston* v. *Payne*, (1795) 2 H. Bl. 527.

(*b*) (1861) 7 H. & N. 410.

(*c*) Gilbert on Distress, 4th ed., p. 24.

(*d*) *Wormer* v. *Biggs*, (1845) 2 C. & K. 31.

(*e*) *Clement* v. *Milner*, (1800) 3 Esp. 95.

(*f*) *Per* Holt, C.J., *Vaspor* v. *Edwards*, (1701) 12 Mod. p. 661; Co. Litt. p. 161a. It was held by Lord Eldon (*Clement* v. *Milner*, (1800) 3 Esp. 95) that if a man came into a field before the trespassing cattle got out of it he might follow them; but according to all the other authorities there is in this kind of distress no such right of taking on a fresh pursuit.

(*g*) *Wormer* v. *Biggs*, *supra*.

(*h*) *Per* Holt, C.J., *Vaspor* v. *Edwards*, (1701) 12 Mod. 658, *supra*. Gilbert on Distress, 4th ed., p. 22.

(*i*) *Ibid.*

(*k*) *Boden* v. *Roscoe*, (1894) 1 Q. B. 608.

trespassing animals may be distrained is not confined to damage to the freehold, but includes damage of all kinds. There a pony of the defendant escaped into the plaintiff's field and kicked a filly of the plaintiff. It was held that the pony might be detained until tender of amends for the injury to the filly. This decision seems to be unsupported by earlier authority, and to be opposed to the received opinion in the text-books on distress (*a*), which is to the effect that the damage must be to *the land or its produce*, under which latter term would of course be included wild rabbits in a warren (*b*). The remedy is one given only to landowners, and presumably must be for a damage which they suffer in that character. But an injury to a chattel, even if done on the plaintiff's land, is not done to him as a landowner.

May be taken in the night.

A distress *damage feasant* may be taken in the night-time, for otherwise the remedy might be lost altogether (*c*).

Distress for market dues.

If goods are exposed for sale in any public fair or market the lord of the franchise may distrain upon them for the amount of toll lawfully payable (*d*). He cannot seize goods sold in fraud of the market outside of its limits, but is left to his remedy by action (*e*).

Distress by court of summary jurisdiction.

The term distress is applied to the process by which a court of summary jurisdiction enforces satisfaction of costs and penalties imposed by its authority. It is rather a special kind of execution than a distress properly so called. The procedure is regulated by 42 & 43 Vict. c. 49, ss. 21 & 43.

For taxes.

The procedure for enforcement of payment of taxes is also, though called a distress, an execution. It is regulated by 43 & 44 Vict. c. 19, s. 86.

For rates.

Rates of various kinds (*f*) are levied by distress under warrant of justices (*g*), the process being virtually an execution (*h*).

(*a*) Bullen on Distress, 2nd ed., p. 257; Gilbert on Distress, 4th ed., p. 21.

(*b*) Rolle Abr. tit. Distress, p. 664.

(*c*) Co. Litt. p. 142a.

(*d*) Gilbert on Distress, 4th ed., p. 18.

(*e*) *Blakey* v. *Dinsdale*, (1777) 2 Cowp. 661; *Bridgland* v. *Shapter*, (1839) 5 M. & W. 375.

(*f*) For poor rate, see 43 Eliz. c. 2, s 2; 17 Geo. II. c. 38, ss. 7, 8; for highway rates, 5 & 6 Will. IV. c. 50, ss. 34, 104; for rates under the Public Health Act, 38 & 39 Vict. c. 55, s. 256. It is to be observed that in respect to poor and highway rates the doctrine of trespass *ab initio* is abolished by the statutes referred to. There was a corresponding provision in the previous Public Health Act (11 & 12 Vict. c. 63, s. 131), which does not seem to have been re-enacted in 38 & 39 Vict. c. 55.

(*g*) 12 & 13 Vict. c. 14. See Ch. XXII.

(*h*) *Hutchins* v. *Chambers*, (1758) 1 Burr. 579.

In distress for rates it is within the jurisdiction of justices; when a ratepayer, though refusing to pay the whole of a legally made rate, tenders a portion thereof: to order the distress to issue only for that portion of the rate which was not actually tendered by him (*a*). The exercise of this power is, however, purely discretionary (*b*).

In cases where a bailiff distraining for rates illegally retains, from the results of the sale, an unreasonable charge for taking, keeping, and selling the distress, the remedies of the distrainee are twofold.

(1.) The statutory remedy prescribed by s. 2 of the Distress (Costs) Act, 1817; or

(2.) By action against the bailiff in the County Court for the return of so much of the charge as is unreasonable (*c*).

(*a*) *Rex* v. *Gillespie*, (1904) 1 K. B. 174; 68 J. P. 11; 20 T. L. R. 113.

(*b*) *Wiles, Ex parte*, (1904) 90 L. T. 225.

(*c*) *Rex* v. *Philbrick & Morey*; *Edwards, Ex parte*, (1905) 2 K. B. 108. As to the scale of charges when the debt does not exceed 20*l.*, see *Headland* v *Coster*, (1905) 1 K. B. 219.

CHAPTER XIII.

TRESPASS TO LAND AND DISPOSSESSION.

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TRESPASS consists in any unjustifiable intrusion upon a person's possession. Possession is the technical name given to the present enjoyment of a definite portion of the soil by a person intending to enjoy it as owner. Possession may be either with title or without.

Definition of possession.

A party claiming to have possession without title must, in order to give him what the law understands by possession, and to enable him to bring an action of trespass, show that he has a *de facto* possession, that is to say, actual physical prehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it. What amounts to such a *de facto* possession must in all cases be a question of degree, but the physical prehension must extend over substantially the whole subject-matter over which possession is claimed. "If there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common" (*a*). So one who works part of a seam of coal does not thereby acquire a *de facto* possession of the whole seam (*b*).

Possession without title.

Must be substantially exclusive.

(*a*) *Per* Bramwell, L.J., *Coverdale* v. *Charlton*, (1878) 4 Q. B. D. p. 118.

(*b*) *Earl of Dartmouth* v. *Spittle*, (1871) 19 W. R. 444; *Ashton* v. *Stock*, (1877) 6 Ch. D. 719.

It is obvious that two persons claiming adversely cannot be in possession of the same portion of the land at one and the same time, therefore a person claiming without title cannot be said to have a *de facto* possession unless the true owner has been dispossessed. In one case a road, the soil and freehold of which was in the plaintiff, ran from a highway to a well, the land on each side of the road belonging to the defendant, and the public, by virtue of a dedication by the plaintiff's predecessor in title, exercised a right of passage over the road to the well. The defendant built a wall across the mouth of the road, leaving a stile for foot-passengers to the well, and levelled the fences on each side of the road so as to throw it and the adjoining fields into one close, and this state of things continued for upwards of twenty years, after which the defendant further obstructed the road. It was held that the plaintiff might, in virtue of his ownership of the soil of the road, maintain trespass for such obstruction, for that the public, by exercising the right of passage, which they derived under the freeholder, kept his title and possession alive, so that the defendant never had the exclusive possession of the soil, and consequently had not acquired a statutory title to it (*a*).

Where, however, there is a right of way appurtenant only to a particular tenement a subsequent enlargement of the user of such way for the benefit of new buildings, will be restrained by injunction (*b*).

Nor, apparently, does the public user of country field paths, by permission, raise any presumption from which dedication may be inferred (*c*). And a similar rule has been held to apply in spite of the fact that the *terminus ad quem*, to which the paths led, was admittedly a public gathering place for religious legislative or political purposes at a period long anterior to the date from which the present proprietor deduced his title (*d*).

If, however, a person be in occupation without title of a strip

(*a*) *Tottenham* v. *Byrne*, (1861). The decision of this case by the Exchequer Chamber is unreported, except in the judgments in *Reilly* v. *Thompson*, (1877) 11 Ir. Rep. C. L. 238; and see *Littledale* v. *Liverpool College*, (1900) 1 Ch. 19, A. C.

(*b*) *Harris* v. *Flower*, (1905) 91 L. T. 816, C. A.

(*c*) *Behrens* v. *Richards*, (1905) 74 L. J. Ch. 615.

(*d*) *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. 188.

of land, over which other persons are in the habit of using a way not by the dedication or permission of the freeholder but as trespassers, then user of the way by such persons does not, as matter of law, prevent such occupation of the land from amounting to possession, but it is matter of evidence for the jury that the occupation was not substantially exclusive (*a*). And the same principle seems to apply where the parties using the way do so under a title not derived from the freeholder. Thus, where a person for a long time enjoyed the exclusive pasturage over certain strips of grass at the sides of a private road, which had been set out under an enclosure award for the use of the owners of certain lands in the neighbourhood, the soil of which road apparently was vested in the owners of the adjoining lands or in the lord of the manor, it was held that the party enjoying the pasturage did not by such enjoyment acquire the possession of the strips so as to entitle him to sue another person for depasturing cattle there, seeing that the exercise by the parties entitled thereto of their right of passage over the whole width of the road, including the strips of grass, prevented his user from being exclusive (*b*); but the Court seems to have treated the question as one of fact, not of law (*c*).

Must be had *animo possidendi.*

But further, in order that occupation may amount to what the law understands by possession, not only must it be exclusive, but it must also have been had *animo possidendi:* the party claiming to have had possession must have intended to deal with the land as owner. "The corporeal act by which possession is acquired must be accompanied by a definite act of the mind in order to enable possession actually to arise" (*d*). "*Apiscimur possessionem corpore et animo, neque per se animo, aut per se corpore*" (*e*).

(*a*) *Reilly* v. *Thompson*, (1877) 11 Ir. Rep. C. L. 288; and see as to Possessory Right, *Every* v. *Smith*, (1857) 26 L. J. Ex. 344.

(*b*) *Corerdale* v. *Charlton*, (1878) 4 Q. B. D. 104.

(*c*) See judgment of Bramwell, L.J. This may possibly be the explanation of the decision of the Court of Appeal in *Haigh* v. *West*, ((1893) 2 Q. B. p. 31), that the churchwardens and overseers of a parish, who by their tenants had enjoyed for the statutory period the pasturage of certain lanes over which there was a public right of way, had acquired a title to the lanes under the Statute of Limitations. The point, however, was not much discussed, and the case was mainly decided on other grounds.

(*d*) Savigny on Possession, Bk. 2, s. 21.

(*e*) Dig. 41, Tit. 2, s. 3.

In *Leigh* v. *Jack* (*a*), the plaintiff had laid out a strip of land as a street, but for certain reasons had never dedicated it to the public, and it was never in fact used by the public. The defendant, who was the owner of an adjoining iron foundry, used the strip of land for upwards of twenty years for the purpose of depositing boilers and refuse from his foundry upon it, but did so knowing that the street was intended to be ultimately dedicated to the public, and that until dedication it was useless to the plaintiff, and merely used the soil in the interval as a temporary convenience, and not in the assertion of ownership, or with the intention of infringing the plaintiff's rights. It was held that the user by the defendant did not amount to possession, and consequently, though extending over upwards of twenty years, conferred no title (*b*).

Possession of surface *primâ facie* includes possession of minerals.

One who without title acquires possession of the surface of land, *primâ facie* thereby acquires possession of the minerals also (*c*), even though they be unopened, for possession of the surface *primâ facie* operates to exclude others from access to the minerals: but that presumption is always liable to be rebutted by showing that the possession of the minerals was in fact in somebody else, for the minerals may be worked from the adjoining land, and apparently even a wrongdoer may, by driving levels through a whole seam of coal, acquire possession of the unworked coal within the limits to which the levels extend (*d*). But this rule does not apply against other than subsequent tort-feasors in cases where the first wrongdoer originally obtained the possession by means of a concealed or fraudulent trespass, and where (owing to ignorance) there was no *laches* on the part of the true owners, against whom the Statutes of Limitation do not run (*e*).

Although in order to constitute actual fraud, so as to prevent the Real Property Limitation Acts from running, the tort complained of must be something more than a mere negligent

(*a*) (1879) 5 Ex. D. 264.

(*b*) See judgment of Cockburn, C.J., p. 271. And in *Coverdale* v. *Charlton*, (1878) 4 Q. B. D. p. 122, Brett, L.J., to a great extent rested his judgment on the absence of an *animus possidendi*.

(*c*) *Per* Parke, B., *Smith* v. *Lloyd*, (1854) 9 Exch. p. 574.

(*d*) See *per* Hall, V.-C., *Ashton* v. *Stock*, (1877) 6 Ch. D. p. 726.

(*e*) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. 351.

encroachment by the wrongdoer, even though such negligence may have resulted in damage to the true owner (*a*).

A possession which satisfies the above-stated conditions, viz., that of being substantially exclusive, and that of being enjoyed *animo possidendi*, confers during its continuance an interest in the subject-matter of the possession as against all who cannot show a title to it; it gives a right to retain the possession and undisturbed enjoyment as against all wrongdoers. He who has such a possession may, just as may the lawful owner, use a reasonable degree of force in its defence (*b*). He may sue in trespass anyone who disturbs his possession, and in such an action not only is it not incumbent on the plaintiff to show a title, but it is no answer for the defendant to show that the title and right to possession is in another person; *jus tertii* is no defence to the action, unless the defendant can show that the act complained of was done by the authority of the true owner (*c*). Nor does it matter how recently the possession was acquired (*d*). This protection which the law gives to bare possession seems to be nothing more than an extension of the protection that it accords to the person (*e*); possession implies to some extent personal presence, and "the inviolability of the person extends to those sorts of disturbance by which the person might at the same time be interfered with" (*f*). In other words the explanation of the protection is to be found in the paramount necessity of preventing breaches of the peace.

To an action of trespass *jus tertii* is no defence.

Moreover, in an action of trespass at the suit of a bare possessor the defence of the *jus tertii* is apparently, in addition to being no defence to the action, no ground for mitigation of damages (*g*). A bare possessor being entitled to recover the

(*a*) *In re Astley and Tyldesley Coal Co. and Tyldesley Coal Co.*, (1899) 80 L. T. 116.

(*b*) *Green* v. *Goddard*, (1704) 2 Salk. 641; *Wearer* v. *Bush*, (1798) 8 T. R. 78.

(*c*) *Graham* v. *Peat*, (1801) 1 East, 244; *Chambers* v. *Donaldson*, (1809) 11 East, 65. It was indeed in early times supposed that in a case of trespass to land as opposed to trespass to goods, on a plea of justification under command of the owner, the averment of command was not traversable, in other words that *jus tertii* was a defence (*Trerilian* v. *Pine*, (1705) 1 Salk. 107). But this doctrine was exploded in the above cases.

(*d*) *Catteris* v. *Cowper*, (1812) 4 Taunt. 547.

(*e*) *Per* Lord Denman, *Rogers* v. *Spence*, (1844) 13 M. & W. p. 581.

(*f*) Savigny on Possession, Bk. 1, s. 6.

(*g*) In an American case of *Cutts* v.

same measure of damages as if he were the owner, for possession is *primâ facie* evidence of title, which cannot be displaced by merely showing that the possession was of recent origin and was not derived from any person who had title (*a*).

And *à fortiori* the above rule applies where the person injured by the trespass is a licensee of the Crown, legally interested in the soil for a specific purpose, such as the cutting of timber (*b*).

How possession without title may be lost.

A bare possessor who voluntarily abandons possession and goes away without any intention of returning loses his possession for all purposes (*c*), and is in the same position as if he had never been in possession at all.

If a possessor without title is expelled by a trespasser who has himself no title he may lose his possession by submitting to the expulsion, or by delaying to re-expel the intruder within a reasonable time. But in the absence of submission and until the expiry of a reasonable time expulsion by a mere trespasser does not divest the possession. In the case of *Browne* v. *Dawson* (*d*) the defendants, trustees of a school, dismissed the plaintiff, the master of the school, and locked the door; the plaintiff subsequently broke open the door, entered and continued in possession without acquiescence on the part of the defendants for ten days, when they forcibly ejected him. To an action of trespass for the ejection they pleaded only a plea of "not possessed," omitting to plead "*liberum tenementum*." It was held that notwithstanding that there was no plea raising the question of title, and that the defendants were consequently to be treated as having a mere possessory interest, the plaintiff could not succeed. "A mere trespasser," said Lord Denman, "cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom

Spring, (1818) 15 Mass. 135, the defendant cut down some trees on land of which the plaintiff was in bare possession. It was held that the plaintiff could, in an action of trespass, recover the value of the trees, notwithstanding that the true owner could be shown. But the ground of the decision was that the plaintiff would be liable over to the true owner in an action for mesne profits. The principle laid down in this case is carried farther in *The Winkfield*, (1902) P. 42, in which damages were awarded although there was no liability over.

(*a*) See below, p. 360, on the subject of Ejectment.

(*b*) *Glenwood Lumber Co.* v. *Phillips*, (1904) A. C. 405, P. C.

(*c*) *Trustees, Executors and Agency Co.* v. *Short*, (1888) 13 App. Cas. 793.

(*d*) (1840) 12 A. & E. 624.

he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." What will be considered to be without delay must depend upon the circumstances of each particular case; in the above case ten days was considered a reasonable time. One remedy then which a bare possessor has for an expulsion by a trespasser is at once to turn out the intruder and reinstate himself, and for this purpose the law sanctions a resort to force. He may break open the outer door, or do any other act of violence necessary to effect an entry, without liability to indictment under the Statutes of Forcible Entry; for it is an essential condition of the establishment of a charge of forcible entry that the party upon whose possession the entry is made should have had the legal possession for civil purposes (*a*), and this *ex hypothesi* the intruder has not. Such an entry by the possessor is to be treated as a forcible resistance of an intrusion upon a possession which he had never lost; and as above pointed out a forcible defence of an existing possession may always be justified provided the force is not excessive. But in cases in which the true owner of the land can be shown it may be that such re-entry is the only practical remedy. In such cases the party dispossessed cannot bring ejectment, for the plaintiff in ejectment must prove his title, and though, as stated above (*b*), mere prior possession raises a *primâ facie* presumption of ownership in fee, that presumption is always liable to be rebutted by its being shown who the true owner is (*c*). It is no doubt said that a bare possessor who has been ousted by a wrongdoer may bring an action to recover damages not only for the ouster itself, but also for the keeping out of possession (*d*). But what is the measure of damages in such form of action seems never to have been clearly determined. It cannot be the value of the land, for if it were, no plaintiff who was doubtful of his title would ever have thought of suing in ejectment. At the most the keeping out of possession can only be regarded as an aggravation of the original trespass,

Remedy of bare possessor for wrongful expulsion.

(*a*) *Per* Lord Selborne, *Lows* v. *Telford*, (1876) 1 App. Cas. p. 427.

(*b*) p. 327.

(*c*) See below, p. 360.

(*d*) See the form of count for a common expulsion in Chitty on Pleadings, 7th ed., vol. 2, p. 659, and note thereto.

from which point of view the damages may possibly be in the discretion of the jury.

A bare possession of land without title, provided it satisfies the two above-mentioned conditions, of being substantially exclusive and of being had *animo possidendi*, will by virtue of the Statutes of Limitation (*a*) in due course of time mature into a title. Provided the original possession be not tainted by "concealed fraud," in which case, as already stated (*b*), Statutes of Limitation do not run against the true owner.

Possession with title.

In the early periods of the history of our law might seems to some extent to have been confounded with right, and actual possession to have been more highly favoured than property or the legal right to possession. Where at the time of the commission of any trespass upon land the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he seems to have been without remedy for such trespass.

Trespass by relation.

In course of time, however, the injustice of not extending to the right to possession the remedies which were allowed to bare possession came to be recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued. This doctrine of possession by relation obtained as between disseisor and disseisee as far back as the reign of Henry VI. (*c*), and its application was down to comparatively recent times considered to be confined to that particular case (*d*); but in 1855 the doctrine was extended to the case of heir and abator (*e*), and three years later was applied to the case of entry by an assignee of a lease (*f*), since which time it must be taken to be of general application. "That is the ordinary doctrine on which actions for mesne profits are founded; you look at the date of the title, and after entry consider the

(*a*) As to which see below, p. 363 *sqq*.

(*b*) See p. 182.

(*c*) Rolle Abr. Trespass per Relation. T.

(*d*) See *per* Parke, B., *Litchfield* v. *Ready*, (1850) 5 Exch. p. 944.

(*e*) *Barnett* v. *Earl of Guildford*, (1855) 11 Exch. 19.

(*f*) *Radcliffe* v. *Anderson*, (1858) E. B. & E. 819.

party entitled to have been then in possession" (*a*). The Courts, however, did not go the whole length of treating the right to possession as *per se* equivalent to possession; they still require (*b*) that a plaintiff who seeks to recover damages for a trespass committed while he was out of possession should, before action brought, go through the form of entry, or, which is equivalent, of making a formal claim.

Entry.

A right to the immediate possession of land is converted into actual possession by entry upon any part of it, or by the making of a claim to it in its immediate neighbourhood, provided that there has been due compliance with all necessary preliminary statutory requirements (*c*). The mere putting of the foot or any part of the person across the boundary is sufficient to constitute entry. Thus, where one being entitled to a house, and being unable to enter at the door, tried to get in through the window, and when half in and half out was pulled out again by the heels, the entry was considered enough to entitle him to an assize (*d*). Where the party entering does so under a right of entry, his entry upon any part of the land vests in him the possession of the whole of the land to which his title relates and which is situate in the same county, and is not at the time of such entry in the possession of more than one wrongdoer. If different portions of the land, the right to which is derived under the same title, are situate in different counties, then, in order to get possession of each portion, he must make a separate entry on each portion, as also where different portions in the same county are in the possession of different wrongdoers (*e*). If the party entitled is afraid to make an actual entry, it is sufficient if he goes as near the land as he dare and makes claim to it; this claiming of the land is of the same effect as entry, and if repeated from time to time the continuance in possession of the disseisor is a new disseisin *toties quoties* (*f*), for the purpose, that is to say, of enabling the person entitled to bring trespass so long as his title remains unbarred, but not for the purpose of preventing the Statute of

(*a*) *Per* Williams, J., *ibid.*, p. 824.

(*b*) As to the case of mesne profits, see next page, note (*c*).

(*c*) *In re Riggs, Ex parte Lorell*, (1901) 2 K. B. 16.

(*d*) Cited in Watkins in Descents, 4th ed. p. 53.

(*e*) *Ibid.*, p. 54.

(*f*) Com. Dig. Claim, A. 1.

Limitations from running (*a*). Nor does the fact of a landlord entering from time to time upon premises, in respect of which he had received no rent for over twelve years, for the purpose of doing repairs, prevent the Statute of Limitations running against him (*b*). Entry or claim by agent is enough to vest the possession in the principal. The entry which is necessary to make the doctrine of relation apply being a mere form, it seems that, as regards a plaintiff's right to bring an action, the cases of land and goods stand practically upon the same footing, that is to say, that he may sue who has either the possession or the right to possession at the date of the trespass committed, subject to this, that in the case of trespass to land the plaintiff must, where he relies on the right to possession and not on the actual possession, go through the form of entry or claim before taking out his writ (*c*). It does not seem, however, to have been expressly decided how far this doctrine of relation will apply where the party entering had at the time of the trespass only an inchoate title to the land; as, for instance, where a trespass is committed to a glebe after institution, but before induction of the parson, the party instituted becoming by institution parson for spiritual purposes, but having before induction no complete title to the temporalities (*d*): or again, where the plaintiff has a mere equity to call for a legal title; as, for instance, where a tenant enters under an agreement for a lease and sues a stranger for a trespass committed between the date of the agreement and that of entry; though possibly, since the Judicature Acts, one who so enters under an agreement for a lease is to be regarded for such purposes as in the same position as one who enters under an actual lease (*e*).

(*a*) 3 & 4 Will. IV. c. 27, ss. 10, 11.

(*b*) *Lynes* v. *Snaith*, (1899) 1 Q. B. 486.

(*c*) To the rule that trespass by relation cannot be set up except where the plaintiff has entered before writ the case of a claim for mesne profits, as against a stranger, presumably does not form any exception. No doubt by Ord. 18, r. 2, of the Rules of the Supreme Court, 1883, it is provided that: "No cause of action . . . shall be joined with an action for the recovery of land, except claims in respect of mesne profits, &c." But the rule does not, it is conceived, do away with the necessity of entry before writ, in the cases to which it applies; for, as has been frequently said, the Judicature Act is merely a statute of procedure, and does not alter the rights of parties.

(*d*) See *Hare* v. *Bickley*, (1577) Plowd. p. 528.

(*e*) See *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. p. 14; *Allhusen* v. *Brooking*, (1884) 26 Ch. D. p. 564; *Louther* v. *Hearer*, (1889) 41 Ch. D. p. 264.

Effect of entry.

The legal effect of entry by a person entitled is not in any way affected by the fact that another who, without title, was previously in possession persists in remaining upon the land concurrently with the true owner. "As soon as a person is entitled to possession, and enters in assertion of that possession . . . the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser" (*a*). Though two or more persons may be concurrently in possession as joint tenants or tenants in common, there can be no such thing as concurrent possession by two persons claiming adversely to one another.

Forcible entry.

A party having a right to the possession of land must not effect his entry with force, otherwise he will render himself liable to a criminal prosecution under the Statutes of Forcible Entry (*b*), the first of which provides that "none shall make entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand nor with multitude of people, but only in a peaceable and easy manner," on pain of imprisonment. The second of those statutes makes a forcible detainer a substantive offence if preceded by a forcible entry; while the third makes a forcible detainer after a peaceable entry an offence, but this must be understood to refer only to the case of an entry which though peaceable was yet unlawful, as being without title (*c*). An entry is forcible within the meaning of the statutes where it is effected by breaking open *outer* doors or windows, even though there be no one in the house at the time (*d*), or where it is accompanied with actual personal violence or even threats of personal violence (*e*); but entry gained by unlocking a

(*a*) *Per* Maule, J., *Jones* v. *Chapman*, (1847) 2 Exch. p. 821, approved by Lord Selborne, in *Lows* v. *Telford*, (1876) 1 App. Cas. p. 426.

(*b*) 5 Rich. II. c. 7; 15 Rich. II. c. 2, 8 Hen. VI. c. 9.

(*c*) *Rex* v. *Oakley*, (1832) 4 B. & Ad. 307.

(*d*) Com. Dig. Forcible Entry, A. 2; and see *Turner* v. *Meymott*, (1823) 1 Bing. 158.

(*e*) Hawkins, P. C., Vol. 1, p. 501; and see *Reg.* v. *Studd*, (1866) 14 W. R. 806.

door with a key or by means of an artifice is justifiable (*a*). Whether breaking open the gate of a field, as opposed to the door of a house, would be a forcible entry, seems to depend upon whether the complainant himself, or some person acting as his agent to retain possession, were in the field at the time; it is not enough that he should have left his cattle there (*b*). A man's field, unlike his house, is not his castle. Breaking an *inner* door of a house is not a forcible entry, even though there be persons in the room (*c*). But though a person who, having the right of possession, exercises his right of entry in a forcible manner, is criminally indictable therefor, the better opinion seems to be that he is not civilly responsible in damages to the party who was in possession, even though, having entered, he expels him; because the entry, although criminal, vests nevertheless the legal possession in the owner, together with all the legal incidents that attach to possession (*d*). There has, however, been a great diversity of opinion on this subject. In *Hillary* v. *Gay* (*e*) Lord Lyndhurst ruled at *nisi prius* that a landlord who, on the expiry of his tenant's term, turned the tenant's wife and furniture out into the street, was liable in damages, because, "if the defendant had a right to the possession he should have obtained that possession by legal means," that is to say, should have brought ejectment. In *Newton* v. *Harland* (*f*) the majority of the Court of Common Pleas, *dissentiente* Coltman, J., held that a civil action would lie for entering and expelling the plaintiff, if the entry was forcible, even though the expulsion was with no unnecessary violence, because such entry being unlawful could not vest the possession in the owner so as to entitle him to treat the other party as a trespasser. And this view has been adopted by Fry, J., in the two most recent cases on the subject (*g*). On the other hand, in *Harvey* v. *Brydges* (*h*) the Court of Exchequer questioned the decision in *Newton* v. *Harland*, and adopted the view of

(*a*) Com. Dig. Forcible Entry, A. 3. It has been said that taking the roof off a house is not a forcible entry (*Jones* v. *Foley*, (1891) 1 Q. B. 730). *Sed quære?*

(*b*) Bac. Ab. Forcible Entry, B.

(*c*) *Per* Coltman, J., *Newton* v. *Harland*, on third trial, (1840) 1 M. & G. p. 669.

(*d*) And see *Turner* v. *Meymott*, (1823) 1 Bing. 158.

(*e*) (1833) 6 C. & P. 284.

(*f*) (1840) 1 M. & G. 644.

(*g*) *Beddall* v. *Maitland*, (1881) 17 Ch. D. 174; *Edwick* v. *Hawkes*, (1881) 18 Ch. D. 199.

(*h*) (1845) 14 M. & W. 437.

Coltman, J. "If it were necessary," said Parke, B., "to decide (the point raised in *Newton* v. *Harland*), I should have no difficulty in saying, that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it, even though in so doing a breach of the peace was committed" (*a*). And in *Blades* v. *Higgs* (*b*), Erle, C.J., treats the case of *Harvey* v. *Brydges* as having overruled that of *Newton* v. *Harland*. In *Pollen* v. *Brewer* (*c*) it was held that no action would lie against a landlord for expelling a tenant at will upon determination of the will. So too in *Burling* v. *Read* (*d*), it was held that a landlord who was entitled to the possession of a workshop in the occupation of the plaintiff could justify in a civil action entering and pulling the workshop down, although the plaintiff was inhabiting it and actually present in it at the time. In *Beattie* v. *Mair* (*e*) a forcible entry by a mortgagee who had a right of entry on default was held to be not actionable. And in *Lows* v. *Telford* (*f*) Lord Selborne apparently approves of the *dictum* of Parke, B., in *Harvey* v. *Brydges*. The weight of authority, therefore, seems to be in favour of the view taken in the text.

Forcible expulsion by owner who has entered peaceably.

If a person entitled to the possession of premises can manage to get in without committing a forcible entry, even though he does so by means of an artifice, he may then justify using force to defend his possession so acquired without rendering himself liable even to a criminal prosecution. He may justify forcibly expelling a trespasser, and it makes no difference that the trespasser was on the premises before the owner. An expulsion, after a peaceable entry by a party having title, does not make

(*a*) See, too, *per* Lord Kenyon, *Taunton* v. *Costar*, (1797) 7 T. R. p. 432.
(*b*) (1861) 10 C. B. N. S. 713.
(*c*) (1859) 7 C. B. N. S. 371.
(*d*) (1850) 11 Q. B. 904.
(*e*) (1882) L. R. Ir. 10 C. L. 208. In this case, however, there was no averment of any assault.
(*f*) (1876) 1 App. Cas. p. 126.

the entry forcible (*a*). The party so entering, however, must be careful to request the other to depart before he can justify laying hands on him to turn him out (*b*), and in no case must he use more force than the occasion requires; for any violence in excess of what is reasonably necessary to effect the expulsion the owner will be liable (*c*). It is in the danger of the jury finding the fact of excessive violence having been used that the practical objection to resorting to this mode of ejectment by force mainly lies; and having regard to that danger, where possession is sought to be recovered of land in the occupation of a wrongdoer, it is in general advisable to have recourse to the remedy by action.

Where there is title the possession need not be exclusive.

The possession of a person who, having title to the land, has entered, continues in him until he has been dispossessed, that is to say, until some other person has acquired a *de facto* possession as above defined. His possession differs from that of a person who has no title in this, that it need not be exclusive; the fact that others are in the habit of wrongfully using a way over his land will not cause him to be any the less in possession of the soil of the way, for his title will, in such case, give him the constructive possession. And further, this constructive continuity of possession which title gives in cases in which actual possession has once been acquired by entry or otherwise, will prevent mere non-user from being construed as an abandonment (*d*).

What may be subject of possession.

For the purposes of possession not only may the soil be regarded as capable of division into areas greater or smaller by lines drawn across the surface, but each of such areas again may be subdivided into layers, each of which layers may be the subject of a separate possession. Thus the owner of a manor may be in possession, by his commoners, of the pasturage on the surface of the waste, concurrently with another person being in possession of the peat immediately under the surface (*e*), while yet a third person may be in possession of the minerals below

(*a*) *Per* Coltman, J., at *nisi prius* on the third trial of *Newton* v. *Harland*, (1840) 1 M. & G. p. 670. From this ruling error was not brought. But see *Per* Fry, J., in *Edwick* v. *Hawkes*, (1881) 18 Ch. D. 199, *contra*.

(*b*) *Green* v. *Goddard*, (1704) 2 Salk. 641.

(*c*) *Gregory* v. *Hill*, (1799) 8 T. R. 299; *Collins* v. *Renison*, (1754) 1 Sayer, 138; but see *Edwick* v. *Hawkes*, (1881) *supra*.

(*d*) *Smith* v. *Lloyd*, (1854) 9 Exch. 562.

(*e*) *Wilson* v. *Mackreth*, (1766) 3 Burr. 1824.

the peat. And each of such parties will be entitled to sue in trespass or expel by force a stranger trespassing on the subject-matter of his possession. Thus, where A. was seised in fee of a close, to the exclusive possession of the pasturage of which B. was entitled during a portion of the year, it was held that A. might maintain trespass against one who during that period drove posts and tent-pegs through the grass into the subsoil (*a*), but not against one who merely rode over the grass during that period, the cause of action in respect of such riding, if unauthorised, being in B. (*b*). Anything attached to the soil, such as grass-plants (*c*), trees, underwood, &c., may be the subject of a separate possession wholly independent of any possession of the soil adjoining or underneath such plants. Thus, where a lord of a manor granted by copy to the plaintiff an exclusive right of cutting underwood in the *locus in quo*, and subsequently leased the manor to another who cut down some of the underwood, it was held that the plaintiff might maintain trespass against the lessee notwithstanding that under his grant by copy no interest in the soil as distinguished from the shrubs passed to him (*d*). In this case the plaintiff could not have sued a person for merely trespassing in the wood by walking between the shrubs, for that would not have been any invasion of his possession; the cause of action in respect of such trespass would have been in the lessee of the manor. "If a man has twenty acres of land and by deed granteth to another and his heirs *vesturam terræ* and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, . . . but he (the grantee) shall have an action of trespass *quare clausum fregit*. The same law if a man grant *herbagium terræ*" (*e*).

Whether the maxim *Cujus est solum ejus est usque ad cœlum* is to be accepted literally as meaning that the ownership of land

Whether the air space above the soil is the subject of possession.

(*a*) *Cox* v. *Glue*, (1848) 5 C. B. 533.

(*b*) *Cox* v. *Mousley*, (1848) *ibid.*

(*c*) *Welden* v. *Bridgewater*, (1592) F. Moore, 302; *Crosby* v. *Wadsworth*, (1805) 6 East, 602; Co. Litt. 4b. It should be observed that *fructus industriales* are treated as mere chattels even before severance (*Evans* v. *Roberts*, (1826) 5 B. & C. 829).

(*d*) *Hoe* v. *Taylor*, (1593) F. Moore, 355; and see *Glenwood Lumber Co.* v. *Phillips*, (1904) A. C. 405, P. C.

(*e*) Co. Litt. 4b. When he says that the land itself shall not pass, Lord Coke is obviously referring to the soil as distinguished from the grass growing on it.

carries with it the possession of the column of air situate above it, or whether it is to be interpreted as meaning merely that a landowner is entitled to complain of any occupation by others of the space above him which materially interferes with his enjoyment of his land, seems doubtful. In *Pickering* v. *Rudd* (*a*) Lord Ellenborough took the latter view; he ruled that trespass would not lie for causing a board to project over the plaintiff's garden, and that it was necessary to show special damage. And in *Fay* v. *Prentice* (*b*), where the plaintiff complained of a projecting cornice, Coltman, J., treated the point as an open one.

On the other hand, in *Ellis* v. *Loftus Iron Co.* (*c*), where the defendant's horse put his head over the fence separating the plaintiff's land from the defendant's, it was held that such an act amounted to a trespass. And in *Corbett* v. *Hill* (*d*), it was held that the right to the vertical column of air above the area of land conveyed by the plaintiff to the defendant in fee *primâ facie* belonged to the latter, as the person seised of the land. The provisions of the Telegraph Act, 1868 (*e*), are based upon the assumption that there is a right of property in the air space, and in *Wandsworth Board of Works* v. *United Telephone Co.* (*f*) Brett, M.R., and Bowen, L.J., seem to have adopted that view, although it became unnecessary to decide the point. It has, however, been decided by the Court of Appeal in *Finchley Electric Light Co.* v. *Finchley Urban District Council* (*g*) that an urban authority in whom the streets are vested under s. 149 of the Public Health Act, 1875, cannot, by reason of the fact that the site of the streets was originally conveyed to turnpike trustees, in fee simple, for the purposes of the Turnpike Acts, prevent the carrying of electric wires over such streets at a height greater than that required for the purposes of traffic.

But, even assuming from the particular facts of the case that there is a right of property in the overlying air space, it must still be a matter of some doubt whether under a lease of the surface the possession of the air space will pass, so as to render

(*a*) (1815) 4 Camp. 219.
(*b*) (1845) 1 C. B. 828.
(*c*) (1874) L. R. 10 C. P. 10.
(*d*) (1870) L. R. 9 Eq. 671.
(*e*) 26 & 27 Vict. c. 112.
(*f*) (1884) 13 Q. B. D. pp. 915 and 919.
(*g*) (1903) 1 Ch. 437.

the lessee the proper person to sue for a trespass upon it. The question has never yet arisen, but possibly the lessor would not be held to assign those portions of the air space which were at a height greater than was necessary for the convenient occupation of the surface. Though, on the other hand, it is, at least, arguable that as a lessor usually demises to his lessee, during the continuance of the lease (in consideration of the payment of the rent and performance of the covenants therein contained) all the rights which he himself possesses in the demised property, the lessee is entitled, by virtue of such demise, to sue a third party who by his action infringes any right inherent in the freeholder of the soil.

Temporary possession.

Doubts seem at times to have been entertained as to whether the temporary character of an occupation does not prevent it from amounting to possession; thus, it has been said that a lodger has no right of action against a trespasser who enters his room without his permission. Blackburn, J., in *Allan* v. *Liverpool* (*a*) says, "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment, or trespass *quare clausum fregit*, the maintenance of the action depending on the possession." And in *Holywell Union* v. *Halkyn Drainage Co.* (*b*) there are *dicta* by Lords Herschell and Davey to the same effect. It seems, however, that the proposition so stated is too broad, and that the question whether a lodger can or cannot bring trespass depends on what is meant by the term lodger. If by the terms of the contract of lodging the lodger is to become an inmate of the house generally and is to occupy such room as the landlord may from time to time assign to him, then no doubt he takes no interest in the land, and his occupation for the time being of any room, even

When lodger may bring trespass.

(*a*) (1874) L. R. 9 Q. B. p. 191. The same judge uses similar language in *Roads* v. *Trumpington*, (1870) L. R. 6 Q. B. p. 62.

(*b*) (1895) A. C. pp. 126, 134.

though he may occupy it exclusively, does not give him the possession of it (*a*). But if by the terms of the contract he is to have not merely a separate room but a *specific* room, then the letting confers an interest in the land and operates as a demise of the room. In the case of *Inman* v. *Stamp* (*b*) Lord Ellenborough at *nisi prius* held that an agreement to let furnished lodgings (which must be taken to mean specific rooms) by the week is an agreement for an interest in land within the Statute of Frauds, and this ruling was subsequently followed by the Court of Exchequer in *Edge* v. *Strafford* (*c*). But the interest which the person taking the lodgings has must clearly be a corporeal interest, that is to say, a right to possession, for otherwise it would amount to a mere easement, and to its being so regarded there are two objections, first, that it has never been suggested that the letting of furnished lodgings ought to be by deed, and secondly, that the law does not recognise such an interest as that of an easement in gross. Moreover, it is apprehended that a lodger who hires a specific room can not merely bring trespass against a stranger, but can also sue his landlord in trespass if he enters the room at unreasonable times, or remains there longer than is reasonably necessary for the due furtherance of his interests as landlord. In *Lane* v. *Dixon* (*d*) a lodger was held entitled to sue his landlord in trespass for breaking and entering his lodging and excluding him from possession. The only question indeed that was expressly argued in that case was whether there was evidence of a breaking and entry; but the question of the sufficiency of the plaintiff's possession was evidently present to the minds of the Court (*e*). Again, it has been stated that the landlord of specific rooms may distrain the lodger's goods for rent in arrear, though such a right is wholly inconsistent with any other view than that the lodger has a tenancy, and consequently has such a possession as will enable him to bring trespass. Though as regards the latter proposition, viz., the right of a landlord of furnished rooms to distrain upon furniture brought in by his lodger, it was held by Manisty, J., at

(*a*) *Wright* v. *Stavert*, (1860) 29 L. J. Q. B. 161.
(*b*) (1815) 1 Stark. 12.
(*c*) (1831) 1 C. & J. 391.
(*d*) (1847) 3 C. B. 776.
(*e*) See *per* Maule, J., p. 784.

nisi prius in *Dicks* v. *Cruikshank and Lacoste* (unreported) that such a distress was illegal, upon the ground that in cases of this description there is no actual tenancy, but only a mere hiring, the landlord having no reversion. The accuracy of this decision may, however, be regarded as questionable. In the case of a guest at an inn, the apparent reason why such a guest cannot as a general rule bring trespass for an intrusion into his apartment is that he does not contract for the occupation of a specific room. If, however, he does so contract to become a guest only on the terms of his having a specific room, there seems to be no reason, apart from the decision in *Dicks* v. *Cruikshank and Lacoste*, referred to above, why he should not be able to bring trespass (*a*). The question with which Blackburn, J., in the cases above referred to was immediately dealing was one of rateability; and though no doubt lodgers and guests at inns of all descriptions are not rateable, that may be explained on the ground of the practical impossibility of collecting the rates from persons whose residence is so temporary. No one can be rated who cannot bring trespass, but it is submitted that the converse proposition is not true.

Rights of guest at inn.

In the absence of an intention on the part of the owner to treat the occupier as a tenant, mere occupation of premises by the consent of the owner, although such occupation be exclusive, does not amount to possession; thus, a servant who for the better discharge of his duties is allowed to have the exclusive occupation of a house cannot bring trespass in respect of it, for the very purpose for which the occupation is in such case given necessarily excludes the idea of any intention to demise (*b*).

Servants.

Whether public bodies authorised by commission or statute to construct and from time to time repair public works, or to exercise the control and regulate the repair of public highways, acquire thereby any interest in the soil of such works or highways, so as to entitle them to sue in a civil action a trespasser doing a physical injury thereto, is simply a question of intention, which is to be

Public bodies.

(*a*) See *per* Tindal, C.J., *Dean* v. *Hogg*, (1834) 10 Bing. p. 351.

(*b*) *Bertie* v. *Beaumont*, (1812) 16 East, 33; *White* v. *Bayley*, (1861) 10 C. B. N. S. 227,

gathered from the language of the commission or statute, as the case may be (*a*).

There can be no doubt, however, that a corporation, acting under statutory powers, which commences breaking up a road without first obtaining permission (where such prior consent is required by the enabling statute) is guilty of a trespass (*b*).

What invasion of possession amounts to trespass.

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field" (*c*). The slightest crossing of the boundary is sufficient, as where the defendant drives a holdfast into the plaintiff's wall (*d*); but the boundary must be crossed, otherwise the defendant cannot be said to have broken and entered. In one case indeed a defendant was held liable in trespass for the act of his servant in merely placing rubbish against the plaintiff's wall, but the only point there argued was whether, assuming that the servant's act amounted to a trespass, the master, who had employed the servant to place the rubbish upon a pathway, but had expressly instructed him not to allow it to touch the wall, was liable for his servant's act in that form of action; the question whether the act amounted to a trespass by the servant at all was not discussed (*e*). In *Dalton* v. *Angus* (*f*) Lord Selborne was of opinion that the easement of support to buildings by the adjoining land is a positive easement, a proposition which seems to involve the notion that mere lateral pressure amounts to a trespass; but all the judges in both Courts below in that case, as well as most of the

(*a*) Cp. *Duke of Newcastle* v. *Clark*, (1818) 8 Taunt. 602, with *Coverdale* v. *Charlton*, (1878) 4 Q. B. D. 104, and *Rolls* v. *St. George, Southwark*, (1880) 14 Ch. D. 785. See, too, *Hollis* v. *Goldfinch*, (1823) 1 B. & C. 205; and *Finchley Electric Light Co.* v. *Finchley Urban District Council*, (1903) 1 Ch. 437.

(*b*) *Bideford Urban Council* v. *Bideford Railway*, (1903) 68 J. P. 123.

(*c*) Bl. Com. Vol. 3, p. 209.

(*d*) *Lawrence* v. *Obee*, (1815) 1 Stark. 22.

(*e*) *Gregory* v. *Piper*, (1829) 9 B. & C. 591: and see *Hurdman* v. *North-Eastern R.*, (1878) 3 C. P. D. 168, C. A.

(*f*) (1881) 6 App. Cas. p. 793.

judges who gave opinions in the House of Lords, took the opposite view.

Trespass lies without damage.

To support an action of trespass it is not necessary that there should have been any actual damage; the trifling nature of the trespass is no defence, and the maxim "*De minimis non curat lex*" has no application to the law of trespass.

The reason of this seems to be precisely the same as that which renders it unnecessary to prove any damage in an action of trespass to the person (*a*), namely, that the law, recognising the absolute necessity of preventing breaches of the peace, allows a right of action in such cases, in order to prevent those, the sanctity of whose persons has been violated, from taking the law into their own hands; and since, as has been pointed out above (*b*), possession implies to some extent personal presence over the whole area of the subject-matter of the possession, all trespass to land will to some extent involve a violation of the sanctity of the person. Whether indeed the action of trespass lies without proof of actual damage in those cases in which the plaintiff had no actual possession at the date of trespass, and in which he only acquires a nominal possession as at such date by virtue of the fiction of relation back (*c*), seems never to have been decided, but if he does so, then admittedly in such case the reason of the thing altogether fails.

Intention in general immaterial.

It is no defence to an action of trespass that the trespass was unintentional, provided the physical act of entry was voluntary; as where a person strays off a footpath in the dark, or where, the boundary between the plaintiff's and the defendant's land being ill defined, the defendant in mowing his own grass by mistake mows some of the plaintiff's (*d*); but if the act be involuntary it is otherwise. "If a man, who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, an action of trespass does not lie" (*e*). There is, however, one case in which the question of trespass or no trespass does

(*a*) See *Ashby* v. *White*, (1703) Lord Raym. p. 955.

(*b*) See p. 327. So the taking of a chattel out of a man's actual possession is an assault upon his person: *per* Powell, J., *Green* v. *Goddard*, (1704) 2 Salk. p. 641.

(*c*) See above, p. 330.

(*d*) *Basely* v. *Clarkson*, (1682) 3 Lev. 37.

(*e*) Bac. Ab. Trespass, F.; and see above, p. 9.

depend upon the intention of the defendant, namely, where by an act done off the plaintiff's land he causes some inanimate thing to pass on to it. Thus if one man throws stones, rubbish, or other materials of any kind on the land of another, or if he intentionally causes the stinking water in his yard to penetrate the wall of his neighbour's house and flow into his cellar (*a*), these are acts of trespass for which he will be responsible without any proof of damage. But if the defendant causes such inanimate things to pass on the plaintiff's land *unintentionally*, and merely as the result of the exercise of his own rights of property, as where he fixes a spout on his roof, whereby the rain-water is discharged on to the plaintiff's land (*b*), or suffers his privy to be out of repair, whereby the filth flows into his neighbour's cellar (*c*), or allows the branches of his trees to spread over his boundary (*d*), or permits sewage to flow on to his land (*e*), these are acts of nuisance, not trespass; the action in former times must have been laid in case, and the plaintiff must consequently establish the existence of appreciable damage.

Justification of trespass.

An entry upon the plaintiff's land is not a trespass unless it be unjustifiable. Justification of the entry may be afforded either by operation of law, or by the act of the plaintiff or of his predecessors in title, where the entry is made under a right of easement or of profit *à prendre*, or under a licence.

Where licence to enter given by law.

In certain cases the law gives a licence to enter against the consent of the possessor; as where a man enters to execute the process of the law. So too "the law gives authority to enter into a common inn or tavern; so to the lord to distrain; . . . to him in reversion to see if waste be done" (*f*). It is indeed customary in leases to insert a covenant by the lessee to permit the lessor and his agents to enter at all reasonable times to view the state and condition of the premises, but that covenant seems

(*a*) *Preston* v. *Mercer*, (1656) Hardr. 61, as explained by Lord Raymond in *Reynolds* v. *Clarke*, (1725) Lord Raym. p. 1403. As to percolation of water see *Hurdman* v. *North-Eastern R.*, (1878) 3 C. P. D. 168.

(*b*) *Reynolds* v. *Clarke*, (1725) Lord Raym. 1399.

(*c*) *Tenant* v. *Goldwin*, (1704) Lord Raym. 1089.

(*d*) *Smith* v. *Giddy*, (1904) 2 K. B. 448; *Lemmon* v. *Webb*, *per* Lindley, L.J., (1894) 3 Ch. p. 11.

(*e*) *Gibbings* v. *Hungerford*, (1904) 1 Ir. R. 211, C. A.

(*f*) *Six Carpenters' case*, (1610) 8 Rep. p. 146b.

to be superfluous: if the landlord's right of entry for such purposes depended solely on the covenant it would be revocable, which it is not. Again, a licence is given by law to go upon the adjoining land to abate any nuisance (*a*); and an entry may be justified for the purpose of preventing the spread of fire (*b*). If the plaintiff wrongfully deposit goods on the defendant's land, the defendant may lawfully go upon the plaintiff's land for the purpose of removing and depositing them there (*c*). On the same principle, when the plaintiff's cattle trespass on the defendant's land, he may chase them back again into the plaintiff's, and is not compelled to distrain them *damage feasant* (*d*). A person cannot justify entering the land of another against his will for the purposes of the sport of fox-hunting (*e*), or of following game started on his own land over the boundary (*f*). A person may justify trespassing on the plaintiff's land for the purpose of recaption of his goods wrongfully placed there, if the goods were put there by the trespass of the plaintiff himself (*g*), and probably the same rule would apply if the cause of the deposit were the act of God (*h*), but not if it cannot be shown how they got there (*i*), or if it be proved that they were put there by the trespass of a third party (*k*). Blackstone indeed suggests (*l*) that where goods have been stolen and deposited by the thief on the land of an innocent third person, the owner of the goods may justify a trespass for the purpose of retaking the goods, and in a case in which it was proposed to plead a justification under those circumstances, Tindal, C.J., thinking the plea to be at least arguable, allowed it to be pleaded (*m*). One cannot justify entering on the plaintiff's land to retake goods, of which his original possession was lawfully acquired, merely because he converts them, as where a bailee refuses to deliver to the bailor. "If a man take my goods and

(*a*) See above, p. 158.

(*b*) *Per* Littleton, J., 9 Edw. IV. 35, pl. 10.

(*c*) *Ree* v. *Sheward*, (1837) 2 M. & W. 424.

(*d*) *Tyrringham's case*, (1584) 4 Rep. 38b.

(*e*) *Paul* v. *Summerhayes*, (1878) 4 Q. B. D. 9.

(*f*) *Deane* v. *Clayton*, (1817) 7 Taunt. 489,

(*g*) *Patrick* v. *Colerick*, (1838) 3 M. & W. 483.

(*h*) *Nicholson* v. *Chapman*, and cases mentioned therein, (1793) 2 H. Bl. 254.

(*i*) *Anthony* v. *Haneys*, (1832) 8 Bing. 186.

(*k*) Bl. Com. Vol. 3, p. 4.

(*l*) *Ibid.*, citing *Higgins* v. *Andrews*, (1619) 2 Rolle, Rep. 55.

(*m*) *Webb* v. *Beavan*, (1844) 6 M & G, 1055, *sed quære*.

bring them on to his own land, I may enter on his land and take my goods, and the entry is lawful, for they came on his land by his own wrong; but it is otherwise if I bail my goods to a man; I cannot justify entering into his house to take my goods, for it was by no wrong that they came there, but by the act of both of us jointly" (*a*). Nor is any licence given by law to the purchaser of goods, even though sold under an execution or distress, to enter upon the premises of the former owner and take them away (*b*), though this rule is apparently not of universal application (*c*). But a tenant who has given up possession of premises cannot justify a subsequent entry for the purpose of removing a chattel which he had left behind him (*d*); he ought to have removed it while he had a right to the land; and indeed where the incoming tenant, or landlord, as the case may be, does not claim to exercise any right of ownership over the chattel, but merely declines to put himself to the trouble of delivering it, and refuses permission to its owner to enter and take it, it has been doubted whether the latter has any remedy at all (*e*).

Trespass *ab initio.*

Where a person having entered upon land under a licence given by law subsequently abuses that licence he becomes a trespasser *ab initio*, his misconduct relating back so as to make his original entry tortious. The reason given for this rule is that "the law adjudges by the subsequent act *quo animo* or to what intent he entered" (*f*). Thus, "if he who enters into the inn or tavern doth a trespass, as if he carries away anything; . . . or if he who enters to see waste breaks the house or stays there all night; or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose" (*g*). So too one who, having lawfully entered for the purpose of levying a distress, subsequently abused his authority, was liable at common law as a trespasser; and this is still the law as regards distress *damage feasant*. But as regards distress

(*a*) 9 Edw. IV. 35, pl. 10.

(*b*) *Williams* v. *Morris*, (1841) 8 M. & W. 488.

(*c*) *Wood* v. *Manley*, (1839) 11 A. & E. 34; *Wood* v. *Leadbitter*, (1845) 13 M. & W. 838 at p. 852.

(*d*) *Wilde* v. *Waters*, (1855) 24 L. J. C. P. 193; and see above, p. 244, note (*a*).

(*e*) *Per* Maule, J., *ibid.*, p. 195.

(*f*) *Six Carpenters' case*, (1610) 8 Rep. 146b.

(*g*) *Ibid.*

for rent and rates, the law on this subject has been altered by a variety of statutes (*a*).

Justification under right of way.

Of justification arising by the act of the plaintiff or his predecessors in title the commonest case is that of a right of way. Any user of a way in excess of the right of the party using it will render him a trespasser; it is, therefore, material in each case to determine what the extent of the right is (*b*).

Private way.

Private rights of way may, as regards the purposes for which the way may be used, be either general or limited. Where the right is created by express grant or by Act of Parliament the extent of the right will depend upon the actual terms of the grant or Act as the case may be. If the terms be general, the purposes for which the way may be used will be general. The user will not be restricted to access to the dominant tenement for purposes for which access would be required at the date of the grant (*c*). Where a right of way is claimed by prescription the general rule is that the extent of the right is to be gathered from the user. But it will not necessarily be limited by the actual user proved. "You must generalise to some extent" (*d*). Proof of user for one class of purposes may be evidence of a right to use the way for another class of purposes not involving a substantially greater burden on the servient tenement (*e*). A *terminus a quo* and a *terminus ad quem* are essential to the claim of a private way (*f*); but so long as the *termini* are clear it seems that the intermediate track need not necessarily be defined (*g*).

Public way.

The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing (*h*), and for ordinary as opposed to extraordinary and excessively weighty traffic (*i*); if a member of the public use it for any other purpose

(*a*) As to which see above, pp. 284–322.

(*b*) *Harris* v. *Flower*, (1905) 74 L. J. Ch. 127.

(*c*) *Watts* v. *Kelson*, (1870–1) L. R. 6 Ch. p. 169, *per* Romilly, M.R.; *United Land Co.* v. *Great Eastern R. Co.*, (1875) L. R. 10 Ch. 586; *Newcomen* v. *Coulson*, (1877) 5 Ch. D. 133; *Dand* v. *Kingscote*, (1840) 6 M. & W. 174, as explained by Malins, V.-C., (1877) 5 Ch. D. p. 139; *Finch* v. *Great Western R. Co.*, (1879) 5 Ex. D. 254.

(*d*) *Per* Parke, B., *Cowling* v. *Higginson*, (1838) 4 M. & W. p. 257.

(*e*) *Ballard* v. *Dyson*, (1808) 1 Taunt. 279; *per* Bovill, C.J., *Williams* v. *James*, (1867) L. R. 2 C. P. p. 580; and *per* Mellish, L.J., *Wimbledon, &c.* v. *Dixon*, (1875) 1 Ch. D. p. 371.

(*f*) Com. Dig. Chimin., D. 2.

(*g*) *Per* Mellish, L.J., *Wimbledon, &c.*, v. *Dixon*, (1875) 1 Ch. D. p. 369.

(*h*) *Dovaston* v. *Payne*, (1795) 2 H. Bl. 527.

(*i*) *Norfolk County Council* v. *Green and another*, (1904) 90 L. T. 451; *Ches-*

than that of passing and repassing he will be a trespasser. Thus, where a person while standing on a high road shot at a pheasant it was held that he was rightly convicted of trespassing in pursuit of game (*a*). So where the defendant was the owner of a grouse moor crossed by a highway the soil of which was vested in him, and the plaintiff on the occasion of a grouse drive went upon the highway for the purpose of interfering with the defendant in the enjoyment of his right of shooting, it was held that the plaintiff was a trespasser and that the defendant's servants were justified in forcibly preventing the plaintiff from continuing such interference (*b*). And in an American case where the soil of the high road opposite the plaintiff's house was vested in him it was held that a person who stopped upon such portion of the high road for the purpose of slandering the plaintiff was guilty of trespass (*c*).

Public meetings in thoroughfares.

The public have no right of holding public meetings in a public thoroughfare (*d*). What will amount to an improper user of a highway is a question of degree (*e*). Wherever an act done upon a highway is such as to amount to a public nuisance (*f*), the doer of it, in addition to being liable to an indictment, is liable to the owner of the soil in trespass (*g*).

With regard to the width over which the public right of passage may extend, "in general where the highway is between two fences all the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption" (*h*), but where there are no fences at the side of the road there is no presumption that

terfield Rural District Council v. *Newton and others*, (1904) 1 K. B. 62, C. A.; *Kent County Council* v. *Folkestone Corporation*, (1905) 1 K. B. 620, C. A. It has been held in a recent case (*The Mayor, &c. of Chichester* v. *Foster*, (1905) 22 T. L. R. 18), where a traction engine, of unusual weight, in passing along a highway damaged pipes laid thereunder, that the owner of the engine (even in the absence of negligence) was liable for the injury so caused.

(*a*) *Reg.* v. *Pratt*, (1855) 4 E. & B. 860.

(*b*) *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. 142.

(*c*) *Adams* v. *Rivers*, (1851) 11 Barb. (N.Y.), Rep. 390.

(*d*) *Ex parte Lewis*, (1888) 21 Q. B. D. 191.

(*e*) *Gwinnell* v. *Eamer*, (1875) L. R. 10 C. P. 658; and see *Chase* v. *London County Council*, (1898) 62 J. P. 184.

(*f*) As to what constitutes a public nuisance, see *Sheringham Urban District Council* v. *Holsey*, (1904) 91 L. T. 225.

(*g*) *Lade* v. *Shepherd*, (1734) 2 Str. 1004.

(*h*) *Per* Blackburn, J., *Euston* v. *Richmond Highway Board*, (1871) L. R. 7 Q. B. p. 75.

anything beyond the actual road has been dedicated (*a*). There is no general right in the public to pass over the foreshore for the purpose of bathing in the sea (*b*). Nor is there any right in the public at common law to tow on the banks of a navigable river (*c*).

Justification under easements of other descriptions.

There are also a variety of easements under which a person may have a right to do some act on the land of another other than that of merely passing across it. Thus the owner of a house may have an easement to hang lines across his neighbour's yard for the purpose of drying linen washed in the house (*d*). So the owner of a public-house may have an easement to erect a sign-board on the adjoining land (*e*), or a fascia on the adjoining house (*f*).

Again, as incident to certain easements, such as a right to use a pump or a watercourse, there exists a right to enter upon the land for the purpose of repairing the subject-matter of the easement, "for when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me" (*g*).

In the case of a nuisance resulting from the defective character of a pipe draining more than one set of premises, it has, however, been held that the repair by the owner of one portion of the land of that part of the pipe which passes through his premises, though conducing to the general advantage, will not entitle him to contribution for his outlay from the other users (*h*).

(*a*) *Attorney-General* v. *Perry*, (1904) 1 Ir. R. 247, C. A.

(*b*) *Blundell* v. *Catterall*, (1821) 5 B. & Ald. 268; and see *Brinckman* v. *Matley*, (1904) 2 Ch. 313, C. A. As to what constitutes an exclusive right to a foreshore, see *Philpot* v. *Bath*, (1904) 20 T. L. R. 589.

(*c*) *Ball* v. *Herbert*, (1789) 3 T. R. 253.

(*d*) *Drewell* v. *Taylor*, (1832) 3 B. & Ad. 735.

(*e*) *Hoare* v. *Metropolitan Board of Works*, (1874) L. R. 9 Q. B. 296; *Moody* v. *Steggles*, (1879) 12 Ch. D. 261.

(*f*) *Francis* v. *Hayward*, (1883) 22 Ch. D. 177, C. A. Where, however, as in these cases, the right claimed consists in the permanent occupation of a portion of the servient soil it may occasionally be difficult to determine whether the case is one of easement or possession, a distinction which becomes material in considering the period of user which will confer a title.

(*g*) *Pomfret* v. *Ricroft*, (1669) 1 Wm. Saund. p. 322.

(*h*) *Nathan* v. *Rouse*, (1905) 1 K. B. 527.

Justification under customary rights of recreation, &c.

There may exist by virtue of immemorial custom a right in the inhabitants of a particular locality to exercise a variety of easements as in gross; such, for instance, as a right of fetching pot water from a spring (*a*), or a right to dry fishing nets on a person's land (*b*), or a right to use it for purposes of sports and recreation (*c*), and where the sea has gradually receded, land added by accretion takes the character of, and becomes subject to the same customs as, the land to which it is added (*d*). It has sometimes been said that a custom to be valid must be reasonable (*e*), but what meaning is to be attached to that phrase is not clear. At all events as regards customary rights of recreation; the cases seem to show that the indefiniteness of the modes of recreation or of the times of the year at which they are to be enjoyed, is no objection to the validity of the custom, even though the practical effect of such indefiniteness may be to deprive the owner of the soil of all beneficial enjoyment of it (*f*). If indeed that were any objection to the validity of a custom there could be no village greens. The place in which a right to a customary easement is claimed to be exerciseable must be situate within the area within which the persons claiming the right reside. Thus, a custom for the inhabitants of one parish to train horses at a place situate in another parish cannot be supported (*g*).

To what persons customary rights extend.

Although customs are usually confined to the inhabitants of a particular town, manor, or parish, there is no rule of law requiring that the area of a custom should not be wider in extent provided that district be one known to and defined by the law, such as a hundred. A custom for the inhabitants of two or more adjoining parishes to exercise rights of recreation over land situate in one of them is bad (*h*). How wide the area may be is not clear, but it seems that it may be at least as wide as a county. A custom for all the men of Kent to dry their fishing nets upon a particular

(*a*) *Race* v. *Ward*, (1855) 4 E. & B. 702.

(*b*) *Per* Tindal, C.J., *Tyson* v. *Smith*, (1838) 9 A. & E. p. 421.

(*c*) *Hall* v. *Nottingham*, (1875) 1 Ex. D. 1.

(*d*) *Mercer* v. *Denne*, (1904) 2 Ch. 534.

(*e*) Bl. Com. Vol. 1, p. 77.

(*f*) *Abbott* v. *Weekly*, (1793) 1 Lev. 176; *Mounsey* v. *Ismay*, (1863) 1 H. & C. 729; *Hall* v. *Nottingham*, (1875) 1 Ex. D. 1, overruling *Millechamp* v. *Johnson*, (1746) Willes, 205 n.

(*g*) *Sowerby* v. *Coleman*, (1867) L. R. 2 Ex. 96. See *Mounsey* v. *Ismay*, (1863) 1 H. & C. 729, *contra*, but the point was not there taken.

(*h*) *Edwards* v. *Jenkins*, (1896) 1 Ch. 308.

close adjoining the sea shore has been held good (*a*). It cannot, however (at all events where, as is usually the case, the right is claimed to be exercised gratuitously), be co-extensive with the whole realm; a custom for the general public to go upon a common such as Newmarket Heath and stay there to witness horse races without payment is void (*b*). Though it is otherwise where the benefit of a custom is claimed only to be enjoyed on payment. Thus, a custom for all members of the public exercising the trade of a victualler to enter upon a close at certain fairs and erect booths there, paying twopence to the owner, has been held to be good (*c*).

Bare licence revocable.

Although a person having a right to exercise an easement upon the land of another may justify entering upon the land for the purposes of its exercise, it must be borne in mind that an easement, where claimed otherwise than under a custom, can only be lawfully claimed as appurtenant to a tenement (*d*). A grant of an easement in gross will confer no interest in the soil, but will operate merely as a personal licence. Such a licence, even though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor, where the revocation is wrongful, is upon the contract. Thus, in *Wood* v. *Leadbitter* (*e*), it was held that the purchaser of a ticket of admission to the grand stand at a race meeting, who was expelled from the stand by the servants of the owner acting under his orders, had no cause of action against the servants so expelling him, since the purchase of the ticket conferred merely a licence which the owner was at liberty to revoke, the Court in this instance overruling the earlier case of *Taylor* v. *Waters* (*f*), in which it had been decided that a silver ticket purporting to

Rights of licensees.

(*a*) 8 Edw. IV. 18, 19; cited at length by Holroyd, J., in *Blundell* v. *Catterall*, (1821) 5 B. & Ald. p. 296.

(*b*) *Earl of Coventry* v. *Willes*, (1863) 9 L. T. N. S. 384; see, too, *Fitch* v. *Rawling*, (1795) 2 H. Bl. 394; and *Bourke* v. *Davis*, (1889) 44 Ch. D. 110.

(*c*) *Tyson* v. *Smith*, (1838) 9 A. & E. 406.

(*d*) See *per* Lord Cairns, *Rangeley* v. *Midland R. Co.*, (1868) L. R. 3 Ch. p. 310. And see *Hill* v. *Tupper*, (1863) 2 H. & C. 121. Bramwell, B., in *Nuttall* v. *Bracewell*, (1866) L. R. 2 Ex. p. 11, suggested the contrary, as also did Mr. Willes in his edition of Gale on Easements, 5th ed. p. 13 n. But their view is counter to the current of authority.

(*e*) (1845) 13 M. & W. 838.

(*f*) (1816) 7 Taunt. 374.

entitle the holder to admission to a theatre was irrevocable. It is to be observed, however, that in both these cases the licence was one of general admission and not to a particular seat. It is not, therefore, to be inferred that the case of *Wood* v. *Leadbitter* is any authority for the proposition that a licence to occupy exclusively a specific seat in a race stand or theatre is revocable. On the contrary, by analogy to the rule as to lodgers (as to which see above, p. 339), such licence would seem to amount to a demise for the time of the particular seat. In one case a lessee for a term of years of a box at the opera which the lessors were bound to repair and to which they had access for that purpose at times when there was no performance, was held rateable under a local Act in respect of such box as being the occupier of a tenement (*a*). But if a letting for a term of years of a box or stall operates as a demise, a letting for a single night ought equally to do so, for the length of the term can make no difference. In *Butler* v. *Manchester, Sheffield, &c. R. Co.* (*b*), where a passenger upon the defendants' railway, having been expelled by the defendants' servants without justification (though with no unnecessary violence) from the train in which he was travelling, brought an action for the assault and not for the breach of the contract of carriage, the Court of Appeal held that the doctrine of *Wood* v. *Leadbitter* did not apply and that the action lay, but upon what ground they distinguished that case does not appear. Moreover, it has been held that although a licence to place chattels on the property of another is revocable at any time, it nevertheless carries with it as necessary incidents the rights to notice of revocation and of reasonable opportunity for removing the chattels (*c*).

Bare licence not assignable

But a licence, being purely personal, is not assignable, and, therefore, will afford no justification for acts done under it by an assignee even prior to revocation (*d*).

Meaning of term "licence coupled with an interest."

It has frequently been said that a licence if coupled with an interest is irrevocable, but in none of the judgments where *dicta*

(*a*) *Reg.* v. *St. Martin's-in-the-Fields*, (1842) 3 Q. B. 204. See also *Leader* v. *Moody*, (1875) L. R. 20 Eq. 145.

(*b*) (1888) 21 Q. B. D. 207.

(*c*) *Mellor* v. *Watkins*, (1874) L. R. 9 Q. B. 400.

(*d*) *Ackroyd* v. *Smith*, (1850) 10 C. B. 164; and see *British Mutoscope Co.* v. *Homer*, (1901) 1 Ch. 671.

to that effect occur, does it appear to have been precisely determined what is meant by the term "interest." If the interest to which the licence is annexed is an interest in the land itself, as where the licence is to go upon land for the purpose of taking a profit out of it, or of enjoying an easement as appurtenant to a tenement, then undoubtedly the licence is irrevocable provided it be in due form; but whether it is enough to render a licence irrevocable that it should be annexed to an interest in mere personal property seems doubtful. As, for instance, where a vendor of chattels lying on his premises sells them on the terms that the purchaser shall come and fetch them away, and afterwards revokes the licence to enter the premises; or where an ordinary bill of sale (apart from the provisions of the Bills of Sale Act, 1882 (*a*)) gives the grantee a power of entry and seizure on default, and the grantor revokes the power; in such cases it is thought that upon principle the licensee could not justify entry after revocation, and that his proper remedy is to sue in detinue. In Viner's Abridgment it is said that "when a man bails goods to another to keep it is not lawful for him, though the doors are open, to enter into the house of the bailee, and to take the goods, but he ought to demand them, and if they are denied to bring writ of detinue and to obtain them by law" (*b*); and it is difficult to see that an express licence given, and subsequently revoked, could improve his position. The case put by Vaughan, C.J. (*c*), of a licence to hunt in a man's park and carry away the deer when killed to his own use, which licence, Parke, B., in *Wood* v. *Leadbitter* (*d*), says would be irrevocable supposing the grant of the deer to be good, is not in reality a case of a licence coupled with an interest in a chattel, for no property in the deer would pass until it were killed, but seems to amount to nothing less than a grant of a profit *à prendre*, which would (provided it were in due form, *i.e.*, by deed, necessarily be irrevocable as passing an interest in the soil. In *Wood*

Rule in case of bailments.

Other licences.

(*a*) 45 & 46 Vict. c. 43. Possibly s. 7 of this Act may be construed to give a statutory power of *entry* for the purposes of seizure in the several events therein specified. The Act gives an implied power of seizure (*Ex parte Official Receiver, In re Morritt*, (1886) 18 Q. B. D. 222).

(*b*) Trespass, H. a 2, 12. See, too, 9 Edw. IV. 35, pl. 10.

(*c*) *Thomas* v. *Sorrell*, (1674) Vaughan p. 351.

(*d*) (1845) 13 M. & W. p. 845.

v. *Manley* (*a*), where the plaintiff sold a rick of hay then standing on his close to the defendant, with the condition that it might remain there up to Lady Day, and that until that date the defendant might enter the close as often as occasion required for the purpose of removing portions of the stack, it was held that such licence could not be revoked, and that the defendant could justify entry against the plaintiff's will. But that case may be explained on the ground that the licence in fact operated as a demise till Lady Day of the spot of ground on which the stack stood (*b*), to which a right of way across the close would be annexed by law as an easement of necessity, so that the express licence was in fact superfluous. The better opinion seems to be that the revocation of a licence to go upon land is inoperative only where an express grant of it is superfluous; where, that is to say, the licence would by operation of law be impliedly annexed to the grant of the interest to which by the terms of the grant it is expressly annexed; and that apparently can only be where the interest is an interest in land (*c*).

When reversioner may sue for trespass.

Although, in general, the only person who can sue for a trespass is the person who was in possession, actual or constructive, at the time of the trespass committed, yet where the trespass causes a permanent injury to the land affecting the value of the inheritance, a person who is entitled in reversion may sue for the injury to his interest, and he may do so at once without waiting until his future estate falls into possession. Thus a reversioner may sue for cutting down timber trees, or destroying a building, or cutting and carrying away turf, or any similar act involving a partial destruction of the freehold. But for a bare trespass, even though committed under a claim of a right of way, and therefore presumably intended to be indefinitely repeated, and intended to furnish evidence against him, the reversioner cannot sue (*d*).

(*a*) (1839) 11 A. & E. 34.

(*b*) See on this subject Lord St. Leonards' criticism of *Wood* v. *Lake*, ((1751) Sayer, 3), in Sugd. V. & P., 14th ed., p. 124, where he suggests that there is no distinction between an exclusive licence and a demise.

(*c*) In *Williams* v. *Morris*, (1841) 8 M. & W. p. 493, Parke, B., says, "It certainly strikes me as a very strong proposition to say that such a licence (*i.e.* to go on land) can be irrevocable unless it amount to an interest in land, which must, therefore, be conveyed by deed."

(*d*) *Baxter* v. *Taylor*, (1832) 4 B. &

Measure of damages in trespass.

In an action of trespass to land the measure of damages to which the plaintiff will be entitled will vary according as the trespass belongs to one or other of the three following classes:—

Trespass productive of benefit to defendant without damage to plaintiff.

First, the trespass may consist of a mere entry, a user of the soil by passing over it without doing any damage. In such case the damages recoverable will, as a general rule, in the absence of matter of aggravation, be nominal only. There is no case to be found in the books in which a trespasser having tortiously used an easement above ground, such as a way, has been made to pay compensation upon the basis of the benefit which has thereby accrued to himself (*a*). A claim for compensation on such basis cannot be made under the head of an account of profits, for the benefit arising from the use of an easement, even though it involve the saving of expense to the trespasser, is not a profit in that sense of the term (*b*). There is no substantial analogy between such a case and that of an infringement of a patent or copyright, in which cases the allowance of an account of profits, though nominally resting upon the artificial rule that the plaintiff may waive the tort and sue for money had and received, is, in substance, nothing more than a rough mode of arriving at a calculation of the damage that the plaintiff has suffered, the profit and the damage being presumably proportional to one another.

And to this rule, that an account of profits cannot be claimed in respect of the tortious user of an easement where no damage has been done thereby, it is apprehended that the case of such user in mines underground forms no exception (*c*). Thus for the tortious user of passages in a mine which had been worked out and abandoned, the damages would presumably be merely nominal.

So where the plaintiff owned a plot of ground so small that he

Ad. 72; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508. As to when reversioner may sue for a nuisance, see below, p. 413, *sqq.*

(*a*) Nor can such compensation be claimed under the head of use and occupation, except under circumstances under which a contract to pay for the user can reasonably be implied; and no implication of such a contract can be made where the plaintiff was ignorant of the existence of the user (*Churchward* v. *Ford*, (1857) 2 H. & N. 446).

(*b*) See judgment of Bowen, L.J., *Phillips* v. *Homfray*, (1883) 24 Ch. D. p. 461.

(*c*) *Powell* v. *Aiken*, (1858) 4 K. & J. 343. See minute of decree where compensation by way of wayleave was not allowed.

could not profitably have worked the underlying coal himself, and the defendants wrongfully worked the plaintiff's coal and subsequently carried other coal over the ways which they had made under the plaintiff's land, Lord Hatherley was of opinion that the plaintiff was entitled only to the value of the coal wrongfully worked, and not to any compensation by way of wayleave in respect of the carriage of the other coal over his land (*a*).

Physical disturbance of the soil.

Secondly, the trespass may involve, in addition to the entry, an actual physical disturbance of the soil, as where a roadway is cut up by constant user of it, or a bank is dug away. In such cases, if the nature of the damage is such that an ordinarily prudent person having no one to look to for damages would restore the soil to its former condition, as in the case of the roadway put above, the measure of the damage will be the cost of restoration; but if the damage is such that no prudent person would restore it at his own expense, the measure of the damages is the difference in value of the land in the market before and after the injury was committed, and not the expense of restoration (*b*). If it were otherwise "it would follow that a party who has let the sea in upon the land of another, the land itself being worth only 20*l*., would have to pay by way of damages the expense of excluding it again by extensive engineering operations" (*c*). But this rule as to the measure of damages in trespass cannot be considered as of universal application, punitive damages having been sometimes awarded. Thus in the recent case of *Davis* v. *Bromley Urban Council* (*d*) (in which the defendant council wrongfully entered upon the plaintiff's land, and demolished a wall he was erecting thereon) it was held by the Court of Appeal that the measure of damages was not necessarily confined to the actual pecuniary loss sustained by the plaintiff, but might also include compensation for matters of aggravation. In the case of a tortious user of an easement which has been productive of damage to the soil, as for instance, where the owner of two portions of a coal-field has wrongfully, and to save himself expense, carried his coal from one portion to the other over the underground

(*a*) *Livingstone* v. *Rawyards Coal Co.*, (1880) 5 App. Cas. p. 38.

(*b*) *Jones* v. *Gooday*, (1841) 8 M. & W. 146.

(*c*) *Per* Alderson, B., *ibid.*, p. 147.

(*d*) *Davis* v. *Bromley Urban Council*, (1903) 67 J. P. 275.

passages of an intervening mine of the plaintiff, and in so doing has damaged the passages and thereby increased the plaintiff's difficulty in getting his own coal, the Court has sometimes, by way of compensation for the damage, decreed an inquiry into the sum which the defendant would presumably have been willing to pay for the right to enjoy the easement (*a*) proceeding apparently upon the assumption that the benefit accruing to the defendant from the user is proportional to the damage caused thereby to the plaintiff (*b*).

Damages for loss of amenity.

In the case of *Whitwham* v. *Westminster Brymbo Coal Co.* (*c*) (in which the defendants had committed trespass by tipping spoil from their colliery on the land of the plaintiff) it was held by the Court of Appeal that in estimating the measure of damages the amount of the depreciation in value of that portion of the adjacent property not taken by the wrongdoers must be added to the value of the land actually appropriated by them, the criterion in assessing the worth of the latter being its value to the wrongdoers for the particular purpose for which it was used.

Again where land was compulsorily taken under the Defence Acts (*d*) for the erection of a fort, it was held that the owner was entitled to compensation for loss of amenity to his adjoining lands arising from the natural and ordinary use of the lands taken for the purpose of a fortification and the firing of guns placed thereon (*e*). But, on the other hand, it has been held a tenant has no right to compensation where, after notice to treat under the Lands Clauses Consolidation Act, but before completion of the agreement (which contained a clause stating that the purchase-money included compensation for all injurious affection) the landowner demised a portion of the lands comprised in the notice (*f*). Where, however, the action of the authority or corporation possessing, for certain purposes,

(*a*) *Hilton* v. *Woods*, (1867) L. R. 4 Eq. 432. And see minute of decree in *Jegon* v. *Vivian*, (1871) L. R. 6 Ch. p. 762; see, too, *Whitwham* v. *Westminster Byrmbo Coal & Coke Co.*, (1896) 1 Ch. 894.

(*b*) *Per* Lord Hatherley, *Jegon* v. *Vivian*, (1871) L. R. 6 Ch. p. 758; and *Phillips* v. *Homfray*, (1871) L. R. 6 Ch. p. 780.

(*c*) (1896) 2 Ch. 538.

(*d*) 5 & 6 Vict. c. 94, s. 19; 54 & 55 Vict. c. 54, s. 11.

(*e*) *Blundell* v. *The King*, (1905) 1 K. B. 516.

(*f*) *Mercer* v. *Liverpool, St. Helen's & South Lancashire R. Co.*, (1904) A. C. 461; and see *Cardwell* v. *Midland R. Co.*, (1904) 21 T. L. R. 22.

compulsory powers of acquisition is *ultra vires* of those powers, the notice to treat is invalid (*a*).

Severance and removal of portions of the soil.

Thirdly, the trespass may involve the severing and carrying away of things attached to the soil or of portions of the soil itself. In respect of this class of injury the old common law rule was that the plaintiff might at his option sue either in trespass for the damage to the land, or in trover for the value of the things severed in their character of chattels. Where the things severed were of a higher value before severance than after, the plaintiff would, of course, elect to sue in trespass, and in such action he was entitled to recover the diminution in the value of the land; thus, in trespass for taking fixtures he could recover their value as fixtures (*b*), though if he made the mistake of suing in trover he could only recover their lower value as chattels (*c*). So, too, if a trespasser cuts down and removes ornamental timber, the owner may in an action of trespass recover the value of the trees when standing.

So long as the plaintiff's option of suing in trespass or trover was confined to cases where the thing severed was of a higher value before severance than after, the plaintiff could not by the exercise of such option recover more than the actual damage that he had suffered. But when the option came to be applied to cases where the thing severed acquired a higher value by reason of the severance a difficulty arose.

Wrongful working of coal.

In *Martin* v. *Porter* (*d*), which was an action of trespass for wrongfully working coal, Parke, B., said that had the action been in trover the plaintiff would have been entitled to the value of the coal as a chattel at the pit's mouth or on the canal bank, or wherever he found it, without any deduction whatever (*e*). But in *Wood* v. *Morewood* (*f*), where the plaintiff sued in trover for working and removing his coal, the same judge abandoned the notion that the plaintiff by suing in one form of action rather than the other could increase the damages, and treated trespass and trover as standing on the same footing; and further, whereas

(*a*) *Batron & Joyner* v. *The School Board of London*, (1903) 20 T. L. R. 22.

(*b*) *Thompson* v. *Pettitt*, (1847) 10 Q. B. 101.

(*c*) *Clarke* v. *Holford*, (1848) 2 C. & K. 540.

(*d*) (1839) 5 M. & W. 351.

(*e*) S. C. p. 352.

(*f*) (1841) 3 Q. B. 440, n.

in the earlier case of *Martin* v. *Porter* (*a*) it was held, somewhat inconsistently with principle, that the plaintiff was entitled to recover in trespass the value of the coal at the time when it first became a chattel at the pit's bottom without any deduction for the cost of severance, and thereby to recover compensation in excess of his actual damage; in the latter case of *Wood* v. *Morewood* (*b*), there was introduced into that rule the qualification that if the defendant was not guilty of any fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, the plaintiff could only recover the fair value of the minerals, as if the seam had been purchased from him by the defendant. The rule so qualified was adopted by the Equity Courts (*c*), and is now the recognised rule upon the subject (*d*). In cases coming within this qualification the plaintiff recovers the amount of his damage and no more, namely, the difference in the value of the soil before and after the abstraction of the minerals. Where, however, the defendant has worked the minerals fraudulently, that is to say, wilfully and without any belief of title, or where he has worked them negligently, the penal rule laid down by the Court in *Martin* v. *Porter* apparently still obtains (*e*). At what point the dividing-line between negligence and inadvertence is to be drawn, or in what the difference (if any) between them consists, seems never to have been decided.

It may be convenient to mention that where on different dates separate demises of different minerals were granted to two lessees —the rights of the earlier of the two were upheld by the Court, and an injunction granted against the later (*f*).

It is apprehended that the measure of damages applicable to the tortious taking of coal and other minerals is equally applicable to the taking of other things which are increased in value by severance from the freehold, such as ripe crops or timber ready for cutting, but the point has never been decided.

(*a*) *Supra*, p. 358.

(*b*) *Supra*, p. 358.

(*c*) *Jegon* v. *Vivian*, (1871) L. R. 6 Ch. 742. Minutes of decree, p. 762.

(*d*) *Taylor* v. *Mostyn*, (1886) 33 Ch. D. 226; *Livingstone* v. *Rawyards Coal Co.*, (1880) 5 App. Cas. 25. And see *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, (1892) A. C. pp. 175–6.

(*e*) *Trotter* v. *Maclean*, (1879) 13 Ch. D. 574; *Taylor* v. *Mostyn*, (1886) *supra*.

(*f*) *Shawsrigg Fire Clay and Enamelling Co.* v. *Larkhall Collieries*, (1903) F. 1131, Ct. of Sess.

Limitation for bringing trespass.

In general and subject to the exceptions for disabilities mentioned above (*a*), all actions of trespass *quare clausum fregit* must be brought within six years next after the cause of action arose (*b*).

Ejectment.

In an action for the recovery of possession of land the plaintiff is put to proof of his title, for the defendant by virtue of his bare possession has a good title as against all who cannot show a better (*c*). Proof that the plaintiff was in possession before the defendant, no matter for how short a time, is *primâ facie* evidence of his having title, for such prior possession raises a presumption that he was seised in fee; but though such presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title (*d*), the weight of authority is in favour of the view that it may be rebutted by showing that the title is in fact in a third person; to an action of ejectment *jus tertii* is a good defence (*e*). The cases of *Doe* d. *Carter* v. *Barnard* (*f*), *Brest* v. *Lever* (*g*), *Nagle* v. *Shea* (*h*), and the judgment of Mellor, J., in *Asher* v. *Whitlock* (*i*), are all direct authorities to that effect, and the case of *Doe* d. *Crisp* v. *Barber* (*k*) also seems to have proceeded upon the assumption that such is the law. Apparently the only authorities which are to be found the other way are the following:—In the headnote to the case of *Allen* v. *Rivington* (*l*) it is said, "In ejectment, if it appear by the record of a special verdict that the plaintiff has a priority of possession, and no title is found for the defendant, the plaintiff shall have judgment." But Serjeant Williams, in his note to Saunders' report of that case, dismisses it with the curt criticism that it "is evidently in direct contradiction of the well-established rule that the plaintiff in ejectment must recover by the strength of his own title, without any regard to the weakness of the defendant's." Moreover, the wide proposition contained in that headnote is not borne

In ejectment *jus tertii* is a defence.

(*a*) p. 176.
(*b*) 21 Jac. I. c. 16, s. 3.
(*c*) See above, p. 327.
(*d*) *Doe* d. *Smith* v. *Webber*, (1834) 1 A. & E. 119; *Doe* d. *Hughes* v. *Dyeball*, (1829) M. & M. 346; *Allen* v. *Rivington*, (1671) 2 Wms. Saund. 111. In none of these cases did the question of *jus tertii* arise.
(*e*) Whether this is the more convenient or more desirable doctrine is another question.
(*f*) (1849) 13 Q. B. 945.
(*g*) (1841) 7 M. & W. 593.
(*h*) (1874) Ir. Rep. 8 C. L. 224.
(*i*) (1865) L. R. 1 Q. B. p. 6.
(*k*) (1788) 2 T. R. 749.
(*l*) (1671) 2 Wms. Saund. 111.

out by the facts of the case, for it did not appear who the true owner was. In *Davison* v. *Gent* (*a*) the Court of Exchequer did indeed directly decide that *jus tertii* could not be set up as an answer to an action of ejectment. But the point had never been argued by counsel, the defendant's case having been directed to a wholly different point. Moreover, that case was expressly dissented from by the Irish Court in the subsequent case of *Nagle* v. *Shea*. In *Asher* v. *Whitlock* (*b*), Cockburn, C.J., also took the view that disseisor's title was good against all but the disseisee, and that a defendant in ejectment could not rely on the *jus tertii;* but he went upon the authority of *Doe* v. *Dyeball* (*c*), in which case it did not appear who the true owner was.

Estoppel between landlord and tenant.

Though in general *jus tertii* is a good defence in an action of ejectment, there are cases in which a defendant will be estopped from setting it up. Just as in an action of trover by a bailor of goods against his bailee the bailee is estopped from disputing his bailor's title, so in the case of ejectment by landlord against tenant the tenant is estopped from disputing his landlord's title. There is, however, this distinction between the two cases, that, whereas, with the sole exception of a plea of eviction by title paramount (*d*), the bailee is equally estopped from showing that his bailor had no title at the date of the bailment, or that his bailor's title has determined since that date (*e*), the tenant of land is always entitled to show that his landlord's title has expired in the interval, either by reason of his having assigned his reversion, or by reason of the landlord having been himself a tenant under a limited interest which has since determined (*f*). The tenant need not allege that he is defending by the authority of the true owner. This distinction, which cannot be regarded as satisfactory, is merely an illustration of the rule stated on the preceding page that *jus tertii* is a good defence in ejectment, a rule which has no counterpart in the case of an action of trover by a prior possessor. It may be that the authorities on this subject require

(*a*) (1857) 1 H. & N. 744.
(*b*) (1865) L. R. 1 Q. B. p. 5.
(*c*) (1829) M. & M. 346.
(*d*) *Ross* v. *Edwards*, (1895) 73 L. T. 100 P. C.; *Biddle* v. *Bond*, (1865) 6 B. & S. 225.
(*e*) *Rogers* v. *Lambert*, (1891) 1 Q. B. 318.
(*f*) See the cases collected in the notes to *Walton* v. *Waterhouse*, (1672) 2 Wms. Saund. 7th ed. 826 (1).

reconsideration. It has been held that if a party claiming a right to demised premises under a title paramount to that of the lessor compels the tenant to attorn to him under a threat of eviction, the tenant though continuing in possession may dispute his lessor's title, for that the compulsory attornment operates as a constructive eviction (*a*). This proposition, however, has been denied (*b*).

It was at one time thought that a lessee for years could not bring an action to recover possession of the demised premises until after entry, on the ground that until entry his title was not complete (*c*). This, however, is not so. "The interest and legal right of possession, where the term is to commence immediately and not *in futuro*, vests in the lessee before entry" (*d*).

Mesne profits.

In an action for the recovery of possession of land (*e*), the plaintiff may in addition recover as against the original party who wrongfully entered into possession, or as against the heir or devisee of such party, damages for the value of the mesne profits which the plaintiff has lost by reason of such wrongful possession.

From whom recoverable.

Whether, however, he can recover such mesne profits from a party wrongfully in possession, who has disseised the original disseisor or has entered under a grant from the original disseisor as lessee for years or as a purchaser in fee, seems doubtful. In *Holcomb* v. *Rawlyns* (*f*) it was held that in both cases, both against the second disseisor and against the grantee of the first disseisor, mesne profits could be recovered by the owner after re-entry. There are, however, cases to be found in the Year Books the other way, which cases were approved in *Liford's Case* (*g*). The supposed objection to holding such parties liable for mesne profits to the true owner is that they would thereby be charged twice over, the presumption being that they have

(*a*) *Mayor of Poole* v. *Whitt*, (1846) 15 M. & W. 571.

b *Delaney* v. *Fox*, (1857) 2 C. B. N. S. 768.

(*c*) Bac. Ab. Ejectment, B.

(*d*) *Per* Pattison, J., *Ryan* v. *Clark*, (1849) 14 Q. B. p. 73; *Harrison* v. *Blackburn*, (1864) 17 C. B. N. S. 678.

(*e*) Rules of Supreme Court, Ord. 18, r. 2. As to which, see above, p. 332, note (*c*).

(*f*) (1595) Cro. Eliz. 540.

(*g*) (1614) 11 Rep. 51 a. The resolution there on this point was unnecessary to the decision, and the earlier case of *Holcomb* v. *Rawlyns* (1595) was not cited. In *Barnett* v. *Guildford*, (1855) 11 Exch. p. 30, however, Parke, B., *obiter*, approved the resolution in *Liford's case*.

already paid the original disseisor. This objection, however, seems very unsatisfactory, for if valid it ought equally to be an answer to the action of ejectment itself; while, with regard to the case of the second disseisor, the presumption that he has paid the first disseisor is in the highest degree artificial. The probability is that at the present day, whenever such a case arises for decision, the Court will prefer to follow the decision in *Holcomb* v. *Rawlyns*.

What they include.

Under the head of mesne profits are included compensation for the value of the use and occupation of the premises, whether occupied by the defendant himself or by a tenant holding under him (*a*), and also any damage which has been caused to the premises themselves (*b*), for the term "mesne profits" is not confined to the profits which have accrued to the defendant, but extends to all loss that the plaintiff has sustained (*c*). In considering the value of the use and occupation the net annual value must be taken.

Statutes of Limitation.

Under the old law of limitation, which was in force down to 1833, not only did the possession of another person not operate as a dispossession of the owner if such possession was not adverse in fact to the owner's title, but neither did it operate as such a dispossession if, though adverse in fact, it was what was termed "non-adverse," under which description were included many kinds of possession which were wholly inconsistent with the title of the owner (*d*). Of such non-adverse possession the old doctrine of *possessio fratris* was an illustration; if upon the death of an owner in fee intestate, in the absence of the real heir, the party next entitled as heir entered and enjoyed the land, his possession was deemed non-adverse, and though continued for the statutory period did not bar the owner. By the statute of Will. IV., however, the whole doctrine of non-adverse possession was swept away (*e*), and the only question now, in cases which the party has entered *without title*, is whether there has been an exclusive

In general the statute will not run unless the possession is adverse.

(*a*) *Doe* v. *Harlow*, (1840) 12 A. & E. 40.

(*b*) *Dunn* v. *Large*, (1783) 3 Doug. 335.

(*c*) *Goodtitle* v. *Tombs*, (1770) 3 Wils. p. 121.

(*d*) The terms "adverse" and "non-adverse" were a cross division, not being mutually exclusive.

(*e*) *Per* Lord Denman, *Doe* d. *Nepean* v. *Knight*, (1837) 2 M. & W., p. 911.

occupation of the land by him as owner; though in two classes of cases in which the party has entered *with title*, namely, those of tenancies at will and tenancies from year to year, the statute of Will. IV., not content with abolishing the fictitious doctrine of non-adverse possession, went a step further and did away with the requirement that the possession should be adverse in fact. A tenant at will or tenant from year to year who remains in possession during the statutory period without payment of rent now acquires a title as against his lessor notwithstanding that his lessor may have entered upon the property to do repairs, or that he may have from time to time during the tenancy made verbal admissions that the occupation was permissive (*a*).

Exceptions.

When the statute begins to run.

The following are the principal provisions of that statute as amended by the Real Property Limitation Act, 1874. No person is to make any entry or bring any action to recover any land but within twelve years next after the time at which the right to make such entry or to bring such action shall have first accrued to him or to some person through whom he claims (*b*), and at the determination of the period, so limited by the Act to any person for making an entry or bringing an action, the right and title of such person is to be extinguished (*c*). Where the person claiming the land, or his predecessor in title, shall have been in possession and shall have been dispossessed or have discontinued possession, the statute is to run from the time of such dispossession or discontinuance of possession (*d*). The difference between dispossession and discontinuance of possession seems to be that the one is where a person comes in and drives out the other from possession, the other is where the person in possession goes out and is followed into possession by another (*e*). If the person entitled has been in possession, mere non-user by him will not amount to a discontinuance of possession. To constitute such a discontinuance there must not only be a dereliction by the owner but actual enjoyment by another person (*f*). But where the person

(*a*) *Lynes* v. *Snaith*, (1899) 1 Q. B. 486. But see *Archbold* v. *Scully*, (1861) 9 H. L. C. 360.

(*b*) 37 & 38 Vict. c. 57, s. 1.

(*c*) 3 & 4 Will. IV. c. 27, s. 34.

(*d*) s. 3.

(*e*) See *per* Fry, J., *Rains* v. *Buxton*, (1880) 14 Ch. D. p. 539. And see *Leigh* v. *Jack*, (1879) 5 Ex. D. 264. As to what constitutes an exclusion of rightful owner see *Philpot* v. *Bath*, (1904) 20 T. L. R. 589.

(*f*) *Per* Blackburn, C.J., *McDonnell* v. *McKinty*, (1847) 10 Ir. L. R. p. 526.

entitled has never been in possession, as where he derives his title as heir or devisee of a person who died seised, or as alienee of a former possessor, and has neglected to enter, mere non-user for the statutory period will extinguish his title, even though no one else was in possession. The statute in such cases runs from the date of his predecessor's death or from that of the alienation, as the case may be (*a*). Thus if a person becomes entitled to a field as devisee and never enters, and the field remains unoccupied for eleven years, and then a trespasser occupies for a year, the owner's right will be barred, and the trespasser will have a good title. Though in such case the squatter's enjoyment of the land is qualified by any restrictive covenants as to user that were obligatory on the earlier possessors of the property, and constructive notice of such covenants will be implied (*b*). In some of the cases there are suggestions that the statute will not run unless there be some person in whose favour or for whose protection it will operate (*c*). But there does not appear to be anything in the Act itself to support that view. On the contrary, s. 34 read together with s. 3 seems expressly to say that in certain cases the owner's title may be extinguished without any title being vested in any one else. The *dictum* of Parke, B., in *Smith* v. *Lloyd* (*d*) that "there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute," was intended to be confined to a case in which the owner had once been in possession and had ceased to occupy, and was not intended to apply to a case where the owner

In that case ejectment was brought for mines, the ownership of which had many years before been severed from that of the surface, and upon which mines the plaintiffs had never specifically entered. The case proceeded entirely upon the question whether there had been discontinuance of possession; it assumed that the plaintiffs had been in possession of the mines, which indeed was the fact, as they had always been in actual possession of other land in the same county, and under the same title, so that specific entry upon the mines themselves was unnecessary to give them possession of them. Had the plaintiffs not had possession of other land in the same county, and under the same title, the decision would presumably have been the other way. See next page, note (*a*).

(*a*) 3 & 4 Will. IV. c. 27, s. 3.

(*b*) *Nisbet & Potts Contract, In re*, (1905) 1 Ch. 391.

(*c*) *Per* Blackburn, C.J., *McDonnell* v. *McKinty*, (1847) 10 Ir. L. R. 514; *per* Kay, L.J., *Willis* v. *Earl Howe*, (1893) 2 Ch. p. 554.

(*d*) (1854) 9 Exch, 562, 572.

had never been in possession at all (*a*). Mere formal entry upon the land by a disseised owner without expulsion of the disseisor will not revest the possession in the owner so as to prevent the statute from running against him (*b*).

Successive independent trespassers.

It seems to have been treated in the old Digests (*c*) as well-settled law that an owner who has been disseised could not before re-entry sue for any trespass committed after the date of the disseisin, because at the time of such trespass he was necessarily out of possession. He was in the same position as an heir or devisee who had never been in possession (*d*). Consequently from the date of his disseisin the period of limitation would continue to run against him until re-entry made or action of ejectment brought; and the fact that the disseisor had gone out of possession in the interval would apparently make no difference. If, therefore, this view is still to be regarded as law, in cases in which land has successively been occupied by a series of trespassers, it is, for the purpose of determining whether the owner is barred, obviously unnecessary to inquire whether such trespassers claimed through one another or whether their possession was continuous. However independent or however discontinuous their possession may have been, after twelve years from the date of the first disseisin the title of the owner would be extinguished (*e*).

There is indeed, modern authority to the contrary. In *Trustees, Executors, & Agency Co.* v. *Short* (*f*), more than forty years before action of ejectment brought, a trespasser had entered into occur pation of the plaintiff's land, but, before he had acquired a statutory

(*a*) This seems clear from the actual decision upon the pleadings, which were as follows:—Action for trespass to a close. Plea that defendant's predecessor in title, 130 years previously, had owned the surface and the minerals, and had conveyed the surface to the plaintiff's predecessor, reserving the minerals, with a right of access to them through the close. Replication that no entry had been made by the defendant within twenty years after the right of entry accrued. Rejoinder that the defendants had not been dispossessed or discontinued possession. This rejoinder was held bad, on the ground that it did not negative the right of entry having accrued on the death of another (which having regard to the date of the reservation of the minerals, must have been the case), and did not aver any entry.

(*b*) 3 & 4 Will. IV. c. 27, s. 10.

(*c*) Rolle, Abr. Trespass, K. 1; Com. Dig. Trespass (B. 2); Co. Lit. 257 (*d*), sect. 430.

(*d*) See above, p. 365.

(*e*) *Doe* d. *Goody* v. *Carter*, (1847) 9 Q. B. 863.

(*f*) (1888) 13 App. Cas. 793, P. C.

title, had abandoned it. The plaintiffs never re-entered, and the land remained unoccupied till less than twelve years before action, when the defendants entered into possession. It was held by the Privy Council that the title of the owner was not barred, and it was there laid down that "if a person enters upon the land of another, and then, without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot enter upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose." And in *Willis* v. *Earl Howe* (*a*), Kay, L.J., while of opinion that a series of independent trespassers occupying in the aggregate for the statutory period would bar the title of the owner if their possession were continuous, seems to have conceded that if there was a break in the continuity by reason of an interval of vacant possession, as in the case last mentioned, the owner would not be barred. In neither of those cases was any earlier authority cited in support of the proposition so laid down, nor does there appear to be any such authority, while the proposition itself seems directly at variance with the foundation of the whole doctrine of trespass by relation (*b*). But if the view of the Privy Council be right, in a case of enjoyment had by successive independent trespassers, the true owner would be barred only in the event of each succeeding trespasser disseising his immediate predecessor; for if any one of the series went out voluntarily there would necessarily be some interval of vacant possession before the successor came in, and the length of the interval could make no difference.

But assuming that the successive occupation by a series of independent trespassers occupying in the aggregate more than

(*a*) (1893) 2 Ch. 545.

(*b*) See above, p. 330. If there is no necessity for entry where the land is vacant, it is difficult to see why s. 3 of the Act of 1833 provided that as between heir and abator the statute should run not from the abatement but from the date of the ancestor's death.

twelve years will suffice to bar the title of the true owner, the question remains which of those trespassers is at the expiry of the period entitled to the possession of the land? The true answer seems to be that suggested by Romilly, M.R., in *Dixon* v. *Gayfere* (*a*), that the person in actual possession at that date is entitled to retain it, not because he has got a statutory title, but because he is in possession and no one else has got any title at all. It has been said that "the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of (twelve) years has elapsed" (*b*), but that proposition is to be understood as limited to cases in which the person so in possession has by himself or his privies been in possession during the whole period, in accordance with the view taken by the Court in *Doe* d. *Carter* v. *Barnard* (*c*). It is one thing to say that the owner's title is extinguished; it is another thing to say that his title has been transferred to any one else. It seems that where the possession during the statutory period has been had by a series of independent trespassers, the one in possession at the end of the period, though entitled to retain that possession so long as he has got it, cannot, if he once allows himself to be dispossessed, bring any action for its recovery (*d*). On the other hand, it has been suggested that the person entitled to the land is the first of the series of trespassers who has not been out of possession for more than twelve years, and that he is entitled to recover on his prior possession (*e*). But that view is based upon the assumption that *jus tertii* is no defence to an action of ejectment, whereas the weight of authority is, as stated above (*f*), the other way. The first trespasser could not, immediately upon his losing possession, have brought an action to recover it, for the title of the true owner, not being barred at that date, would have afforded an answer; and it cannot be that his position would be bettered by reason of a subsequent possession

(*a*) (1853) 17 Beav. 421.

(*b*) *Per* Parke, B., *Doe* d. *Jukes* v. Sumner, (1845) 14 M. & W. p. 42.

(*c*) (1849) 13 Q. B. 945.

(*d*) *Doe* d. *Carter* v. *Barnard*, (1849) 13 Q. B. 945.

(*e*) In *Asher* v. *Whitlock*, (1865) L. R. 1 Q. B. p. 4, Cockburn, C.J., *arguendo*, said he doubted the correctness of Lord Romilly's *dictum* in *Dixon* v. *Gayfere*, (1853) 17 Beav. 421. But the case upon which he relied for the contrary does not bear him out, in that case no *tertius* being shown.

(*f*) See above, p. 360

had not by himself but by a stranger holding adversely to him.

Possession or receipt of the entirety, or of more than his due share, of the land or of the profits thereof by one of several joint tenants or tenants in common, is to be regarded as *pro tanto* a dispossession of the others (*a*).

When possession is to be regarded as adverse.

Possession is never to be regarded as the dispossession of another if it can be referred to a lawful title, for no man shall be heard to set up his own wrong. In one case in a marriage settlement copyhold lands of the wife had been settled on the husband in fee in the event of his surviving his wife, but there was no surrender to the uses of the settlement, and the husband having survived her was admitted expressly to hold "pursuant to the uses of the settlement," and being so admitted remained in possession until his death more than twenty years afterwards. On ejectment being brought by the heir-at-law of the wife against one claiming as devisee of the husband, it being proved that by the custom of the manor the husband was entitled to hold by curtesy for his life, it was held that, notwithstanding the express terms of the admission, the husband's possession was to be referred to the custom and not to the settlement, which, there having been no surrender to uses, could have given him no title (*b*).

An Act which, though amounting to a trespass, is beneficial to the owner, is not necessarily to be regarded as an adverse act, and as constituting a dispossession. Thus it has been held that the clipping of a hedge on both sides from time to time as occasion required by the owner of the adjoining land, did not after the statutory period confer a title to the site of the hedge, on the ground that to keep a person's hedge in repair for him is not an adverse act (*c*). But, where a railway company erected a post and rail fence as their boundary and planted a hedge inside it at a distance of four feet from the fence; and as the hedge grew up allowed the fence to decay so that the four-foot strip came to be thrown into the adjoining field, it was held that the owner of the

(*a*) 3 & 4 Will. IV. c. 27, s. 12.

(*b*) *Doe* v. *Brightwen*, (1809) 10 East, 583. This case was decided under the old law, but it is equally applicable to the present.

(*c*) *Searby* v. *Tottenham R. Co.*, (1868) L. R. 5 Eq. 409. The doubts expressed as to this case by James, L.J., (1879) 13 Ch. D. p. 271, n., do not seem to touch the point for which it is here cited.

field having occupied the strip for twenty years had acquired a statutory title to it, notwithstanding that the company's servants had annually stepped over the hedge on to the four-foot strip for the purpose of clipping the hedge, for that their doing so must be referred to an intention to discharge their duty towards the adjoining owner of keeping the hedge in a proper state of repair, and not to an intention to retain actual possession of the strip (*a*).

But, on the other hand, it was held by the Court of Appeal in the more recent case of *Littledale* v. *Liverpool College* (*b*) that a merely equivocal act of possession, though exercised during a period exceeding twelve years, was not necessarily adverse to the original owner, and consequently did not operate as a statutory transference of title.

Remainderman.

In the case of future estates the right accrues at the time when the estate becomes an estate in possession, subject to this, that if the owner of the particular estate was out of possession at the time when his interest determined, then the action shall only be brought within twelve years after the owner of the particular estate ceased to be in possession, or within six years after the future estate falls into possession, whichever period shall be the longer, provided that if under such circumstances the owner of the future estate be once barred, all persons claiming to be entitled to any subsequent estates under any deed, will, or settlement, executed or taking effect after the accrual of the right of action of the owner of the particular estate, shall be barred also (*c*).

Reversioners.

Where land is let under a lease, though the landlord may under the terms of the lease have a right of entry for any forfeiture or breach of condition, if he does not choose to avail himself of such right and waives the forfeiture, then for the purposes of the statute the right is to be deemed to accrue upon the expiry of the lease (*d*), and mere non-payment of rent for the whole statutory period will not affect the landlord's title to the reversion; though his right to recover any rent reserved by the lease is limited by

(*a*) *Norton* v. *London & North Western R. Co.* (1879) 13 Ch. D. 268.
(*b*) (1900) 1 Ch. 19.
(*c*) 37 & 38 Vict. c. 57. s. 2.
(*d*) 3 & 4 Will. IV. c. 27, s. 4.

the statute to six years' arrears (*a*). But if, the rent reserved by the lease being more than forty shillings, the tenant not merely does not pay it to the landlord, but pays it wrongfully to a third person, in such case the statute runs not from the expiry of the lease but from the date of the first wrongful receipt of rent by such third person. Where a remainderman has a right of entry by reason of a forfeiture, omission to take advantage of the forfeiture will not set the statute running (*b*).

In the case of a tenancy from year to year under a lease not in writing, the statute runs from the end of the first year or from the last receipt of rent, whichever shall last happen (*c*). But where the tenancy is from year to year under a lease in writing, in the absence of something done by the tenant amounting to a repudiation of the landlord's title, it seems that the statute does not run until the landlord chooses to give a notice to quit (*d*).

In the case of possession had under an agreement for a lease the statute does not run during the period of the intended term (*e*).

Tenancies at will.

Where a person is in possession of premises as tenant at will, the right of entry of the landlord shall, if there has been no previous determination of the will, be deemed to accrue at the expiry of one year from the commencement of such tenancy, at which time such tenancy shall be deemed to have been determined (*f*). If a person be in possession of premises as tenant at will, and the landlord enters and does any act of ownership without the tenant's consent, that determines the tenancy at will, and the occupation of the tenant, if continued, is thereby converted into a tenancy at sufferance (*g*). If nothing further takes place to give rise to a new tenancy at will, such tenancy at sufferance will coalesce with the earlier tenancy at will, and the statute will run from the expiry of the first year of the tenancy at will or from the date of its determination, whichever was the earliest (*h*). But if a

(*a*) *Archbold* v. *Scully*, (1861) 9 H. L. C. 360.

(*b*) 3 & 4 Will. IV. c. 27, s. 4.

(*c*) s. 8.

(*d*) But see *Stagg* v. *Wyatt*, (1838) 2 Jur. 892, as to when a notice to quit is to be presumed.

(*e*) *Warren* v. *Murray*, (1894) 2 Q. B. 648.

(*f*) 3 & 4 Will. IV. c. 27, s. 7.

(*g*) *Doe* v. *Turner*, (1840-2) 7 M. & M. 226; 9 M. & W. 643.

(*h*) *Day* v. *Day*, (1871) L. R. 3 P. C. 751.

new tenancy at will is created the statute runs from the end of the first year of such new tenancy (*a*). The question whether a new tenancy at will has been created is one for the jury; but very slight evidence will warrant them in so finding (*b*). If, when a person is in possession as tenant at will, the landlord not merely determines the will, but actually puts the tenant out of possession for ever so short a time, the tenant cannot by wrongfully resuming possession cause his subsequent possession to coalesce with his earlier tenancy at will; the statute will in such case run from the date of resumption of possession (*c*).

Occupation by servants.

Where a servant is permitted to occupy gratuitously premises belonging to his master, for the purpose of the more convenient discharge of his duties, he does not thereby acquire any tenancy at will therein, for such occupation is to be treated as the possession of his master and not as an independent possession of his own (*d*); and this is so even though the servant may by the terms of his employment be permitted to carry on an independent business on the premises (*e*). Consequently, however long such occupation by the servant may be continued, it will never give him a good title against his master. Thus, where a land-owner built a school-house on his property, and appointed a schoolmaster, giving him a small stipend, but allowing him to charge fees to the scholars, and permitting him to occupy the premises as a school, it was held that, the schoolmaster being in the position of a servant, twenty years' occupation did not give him a good title (*f*). But to prevent the statute from running in such case there must be actual service during the period of occupation; there must be some duties performed. The mere fact that the person occupying the premises was once a servant of the owner and is pensioned off, will not prevent him from acquiring a title if his occupation is not conditioned by the performance of some duty.

If a tenant at will, not merely verbally admits the title of his lessor, but also pays him rent, that will prevent the statute from

(*a*) *Locke* v. *Matthews*, (1863) 13 C. B. N. S. 753.

(*b*) *Doe* v. *Turner*, (1840-2) 9 M. & W. 643.

(*c*) *Randall* v. *Stevens*, (1853) 9 E. & B. 641.

(*d*) *Bertie* v. *Beaumont*, (1812) 16 East, 33.

(*e*) *White* v. *Bayley*, (1861) 10 C. B. N. S. 227.

(*f*) *Lessee of Moore* v. *Doherty*, (1843) 5 Ir. L. R. 449.

running, for the receipt of rent payable by any tenant from year to year, or other lessee (which latter term would seem to include a tenant at will), is as against such lessee to be deemed to be the receipt of the profits of the land for the purposes of the Act (*a*).

Encroachments by tenants.

A tenant who avails himself of the opportunity afforded him by his tenancy to make encroachments upon the adjoining land of third persons, is presumed to have intended to make them for the benefit of his lessor, unless there be circumstances pointing to an intention to take the land for his own benefit exclusively (*b*). And the assent of the lessor to the making of the enclosure makes no difference (*c*). The tenant, therefore, in general cannot acquire a statutory title to the subject-matter of the encroachment by possession had during the tenancy; the statute only begins to run in his favour after the tenancy has expired But the above presumption does not apply unless the relation of landlord and tenant existed at the date of the encroachment made. Moreover one who occupies as his own, land belonging to another, and subsequently becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession but can, whilst he remains tenant, acquire as against his landlord a prescriptive title to the land so occupied by him (*d*).

The right of entry or action by a mortgagee is barred after twelve years from the date of the last payment of principal or interest (*e*).

Disabilities.

If at the time of the accrual of his right of entry or action the party entitled is under a disability by reason of his being infant, idiot, or lunatic, a further extension of time is allowed of six years from the termination of the disability (*f*), subject to this that the entry or action must be made or brought within thirty years after the accrual of the right (*g*). No extension of time, however, is allowed for absence of the party entitled beyond seas (*h*); and the disability which formerly existed in the case of

(*a*) 3 & 4 Will. IV. c. 27, s. 35.
(*b*) *Doe* v. *Jones*, (1846) 15 M .& W. 580.
(*c*) *Whitmore* v. *Humphries*, (1871) L. R. 7 C. P, 1.
(*d*) *Dixon* v. *Baty*, (1866) L. R. 1 Ex. 259.
(*e*) 7 Will. IV. & 1 Vict. c. 28, s. 1.
(*f*) 37 & 38 Vict. c. 57, s. 3.
(*g*) s. 5.
(*h*) s. 4.

coverture is now removed by the effect of the Married Women's Property Act, 1882 (*a*).

An acknowledgment in writing of the title of the person entitled to any land or rent, given to him or his agent by the person in possession or receipt of the profits of the land or rent, is to be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given (*b*), and the statute is set running afresh from the date of such acknowledgment.

Concealed fraud.

In every case of a "concealed fraud" the right of a person to sue for the recovery of any land "of which he or any person through whom he claims may have been deprived by such fraud," is to be deemed to accrue at the time when the fraud is, or with reasonable diligence might have been discovered, except as against a *bonâ fide* purchaser for value (*c*). What is the exact meaning of the expression "concealed fraud" it is not very easy to determine. It is settled that mere ignorance by the owner of his rights is not enough to prevent the statute from running (*d*); such ignorance must be the result of a fraud on the part of some person or other; but whether the word "concealed" adds anything is doubtful (*e*). In *Lawrance* v. *Lord Norreys* (*f*) Stirling, J., was of opinion that fraudulently obtaining possession of the plaintiff's evidences of title and destroying them was a concealed fraud, but this point was left open by the Court of Appeal (*g*) and also by the House of Lords (*h*). In *Vane* v. *Vane* (*i*) it was held that if a father brought up his younger son in the belief that his elder illegitimate brother was legitimate, whereby upon the father's death the younger son was induced to allow the elder brother to enter and enjoy the estate, that was a concealed fraud within the rule. Although it was once thought otherwise (*k*), it is now well settled that the fraud must be the fraud of the person in possession or of his predecessor in title (*l*):

(*a*) 45 & 46 Vict. c. 75. See *Lowe* v. *Fox*, (1885) 15 Q. B. D. 667.
(*b*) 3 & 4 Will. IV. c. 27, s. 14.
(*c*) 3 & 4 Will. IV. c. 27, s. 26.
(*d*) *Willis* v. *Earl Howe*, (1893) 2 Ch. 545; *Thorne* v. *Heard*, (1895) A. C. 495.
(*e*) See *per* Lindley, L.J., (1893) 2 Ch. 550.
(*f*) (1888) 39 Ch. D. 213.
(*g*) *Ibid.*
(*h*) (1888–90) 15 App. Cas. 210.
(*i*) (1872–3) L. R. 8 Ch. 383.
(*k*) *Per* James, L.J., *Vane* v. *Vane*, (1872–3) L. R. 8 Ch. p. 397.
(*l*) *Willis* v. *Earl Howe*, (1893) 2 Ch.

the fraud of a stranger is not enough. But it is to be observed that a plaintiff who seeks to bring himself within the exception of concealed fraud must show that by means of such fraud he or some person through whom he claims was "deprived" of the land; and the authorities establish that a person cannot be said to have been deprived by the fraud, if the fraud was subsequent to the wrongful entry which gave him a right to bring ejectment. Fraud, however active, the effect of which is merely to conceal the existence of a cause of action already vested will not suffice (*a*). The statute having once begun to run, no amount of subsequent fraud will prevent it from continuing to do so.

The owner's ignorance of his right of action may result either from his ignorance of the existence of his title, or from his ignorance of the fact of the other party's enjoyment. Where that enjoyment is underground, as for instance where an adjoining mine-owner by driving levels through his neighbour's coal seam takes possession of the seam (*b*), or where one digs and occupies a cellar under his neighbour's house, the mere conscious violation of the owner's right itself amounts to fraud (*c*). It has indeed been said that an underground trespass, even though innocently committed, must be considered to be a concealed fraud (*d*). This however does not accord with the other authorities. To amount to a fraud within the meaning of the statute the act must be done neither by inadvertence nor under a *bonâ fide* belief of title (*e*). But the onus of proof in respect of such belief must lie on the party setting it up, for every secret underground trespass is *primâ facie* fraudulent. Where therefore the necessary conditions of wilful and secret trespass on the part of the wrongdoer and ignorance coupled with absence of laches on the part of the aggrieved person are fulfilled, nothing more is

545; *Thorne* v. *Heard*, (1895) A. C. 495; *McCallum, In re, McCallum* v. *McCallum*, (1901) 1 Ch. 143.

(*a*) *Lawrance* v. *Lord Norreys*, (1888–90) 15 App. Cas. 210; *Willis* v. *Earl Howe*, (1893) 2 Ch. 545; *Thorne* v. *Heard*, (1895) A. C. 495.

(*b*) See above, p. 326.

(*c*) In *Rains* v. *Buxton*, (1880) 14 Ch. D. 537, where fraud was negatived, there was a door to the underground cellar opening into the area, so that the fact of the occupation was patent.

(*d*) *Per* Malins, V.-C., *Ecclesiastical Commissioners* v. *North Eastern R. Co.* (1877) 4 Ch. D. p. 860. See above, p. 183.

(*e*) *Trotter* v. *Maclean*, (1879) 13 Ch. D. 574. These last two cases were decided under the statute of James, limiting the time for bringing trespass, but the principle is the same.

necessary to establish the existence of a concealed fraud which will prevent the running of the Statute of Limitations (*a*).

Waste.

The subject of injuries to reversionary interests in land caused by an act of trespass on the part of a stranger has already been dealt with above (*b*). It remains to deal with those injuries to the reversion which are caused by a person in possession of the land under a limited interest, and which are known by the name of waste. Waste has been defined to be "the committing of any spoil or destruction in houses, lands, &c., by tenants, to the damage of the heir, or of him in reversion or remainder" (*c*). The old writ of waste having been abolished by statute (*d*), the present common law remedy for such injury is an action on the case. The gist of such action is damage; nominal damages cannot be recovered, nor unless the damage be substantial will the Court interfere by injunction (*e*). It was formerly thought that any alteration of the tenement amounted to waste even though it had the effect of improving the value instead of diminishing it; thus it was said that "if the tenant build a new house it is waste" (*f*). But that is no longer the law. It is essential to show that the new building or other act complained of is an injury to the inheritance (*g*). The breaking up of a permanent pasture will be waste (*h*). So will the working of mines unopened at the commencement of the tenancy (*i*). So the cutting of timber, except for the purpose of repairs, is an act of waste. To that rule, however, there is apparently an exception in the case of what have been termed "timber estates"; that is to say, estates which are cultivated merely for the produce of saleable timber, and upon which the practice has been to cut the timber periodically and treat the proceeds as part of the annual profits of the land (*k*). Another head of damage which in former times

What amounts to waste.

(*a*) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. 351, P. C.

(*b*) p. 254.

(*c*) Bac. Abr. Vol. 8, p. 379.

(*d*) 3 & 4 Will. IV. c. 27.

(*e*) *Doherty* v. *Allman*, (1878) 3 App. Cas. 709.

(*f*) Co. Litt. 53a.

(*g*) *Jones* v. *Chappell*, (1875) L. R. 20 Eq. 539; *Meux* v. *Cobley*, (1892) 2 Ch. 253.

(*h*) Co. Lit. 53 b.

(*i*) *Ibid.*

(*k*) *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; *per* Jessel, M.R., *Honeywood* v. *Honeywood*, (1874) L. R. 18 Eq. p. 309; *Ferrand* v. *Wilson*, (1845) 4 Hare, 344.

was treated as highly material in considering whether an act amounted to waste was the destruction of the evidence of the reversioner's title. Any act which so altered the character of the tenement as to diminish the means of identifying it, even though not in other respects prejudicial to the inheritance, was treated as an act of waste. But that head of damage, at all events in the case of rural estates, may at the present day be regarded as obsolete, as "nowadays, when there are ordnance surveys . . . and where the property is marked out on a map . . . any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal" (*a*). Where, however, the tenant has made a material and enduring alteration in the character of the land, even though such alteration may tend to enhance its value, the misfeasance will support an action for waste, in respect of which a court will award substantial damages for the past wrong, and an injunction restraining future acts of a similar character (*b*). In an action for waste the measure of damages is (in the absence of any matter of aggravation) the diminution in the value of the reversion, less a discount for immediate payment (*c*).

All the kinds of waste above referred to belong to the class known as "voluntary waste," which consists of acts of misfeasance.

Permissive waste.

There is another class of waste known as "permissive," which consists of omission, in neglecting to keep the premises in a state of repair, in cases in which a duty to repair exists.

Actions of tort for waste of the former class usually arise between remainderman and tenant for life. But they may also arise between landlord and tenant. Just as an act of misfeasance on the part of a bailee of a chattel is none the less a tort because it is also a breach of the contract of bailment (*d*), so with an act of voluntary waste on the part of a tenant for a term of years. Actions for permissive waste, on the other hand, rarely arise

(*a*) *Per* Lord Blackburn, *Doherty* v. *Allman*, (1878) 3 App. Cas. p. 735. And see *per* Jessel, M.R., *Jones* v. *Chappell*, (1875) L. R. 20 Eq. p. 542.

(*b*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. 624.

(*c*) *Whitham* v. *Kershaw*, (1885–6) 16 Q. B. D. 613.

(*d*) *Hayn* v. *Culliford*, (1879) 4 C. P. D. 182. As to when a bailee is *not* responsible for the tortious act of his servant, see *Sanderson* v. *Collins*, (1904) 1 K. B. 628.

except as between landlord and tenant, and as between such parties, whatever the form of action may have been in its origin, it can hardly at the present day be regarded otherwise than as an action for breach of contract. No action of tort will lie against a tenant for life for permissive waste (*a*), even in the case of leaseholds (*b*), unless by the terms of the will or deed creating the settlement he is expressly required to keep the premises in repair (*c*).

Equitable waste.

It is not unusual in instruments of settlement to provide that the tenant for life shall be unimpeachable of waste. The effect of such a provision at law was to enable the tenant to cut down all the timber on the estate or commit any other acts of voluntary waste with impunity (*d*). But from comparatively early times the Court of Chancery interfered to prevent him from committing what was known as "equitable waste," that is to say, making an unconscientious use of his legal right (*e*), such as wantonly destroying the mansion house (*f*), or cutting down ornamental timber (*g*). Such equitable waste, however, not being a breach of any legal duty was not a common law the subject of an action for a tort. But now the legal right to commit waste of that description has been taken away by the Judicature Act, which provides by s. 25, subs (3), that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." By that provision the jurisdiction of the Court to interfere to prevent equitable waste in the future seems to be rested upon a new ground, namely, the presumption of absence of intention on the part of the settlor to confer a right to commit it.

Ecclesiastical dilapidations.

The action which by the common law lay against the executors

(*a*) *In re Cartwright*, (1899) 41 Ch. D. 532.

(*b*) *Parry and Hopkins, In re*, (1900) 1 Ch. 160.

(*c*) *Woodhouse* v. *Walker*, (1880) 5 Q. B. D. 404.

(*d*) *Per* Turner, L.J., *Micklethwait* v. *Micklethwait*, (1857) 1 De G. & J. p. 524.

(*e*) *Micklethwait* v. *Micklethwait*, (1847) 1 De G. & J. at p. 524.

(*f*) *Vane* v. *Barnard*, (1716) 2 Vern. 738.

(*g*) *Marquis of Downshire* v. *Lady Sandys*, (1801) 6 Ves. 107. By this term "ornamental" is to be understood not trees which are in fact ornamental, but trees which are planted for the purposes of ornament: *Wombwell* v. *Belasyse*, (1825) 6 Ves. 110 a (note).

of a deceased incumbent of an ecclesiastical benefice at the suit of his successor for dilapidations was an action of tort in the nature of waste (*a*). The position of an incumbent was analogous to that of a tenant for life with this difference, that he was liable for permissive as well as voluntary waste. The damages recovered in such action were not payable by the executor until after all the simple contract debts of the testator had been satisfied; and, when paid, the party receiving them was under no obligation to expend them in repairs. But the law on this subject has been altered by the Ecclesiastical Dilapidations Act, 1871 (*b*), which provides that, the amount of the dilapidations having been ascertained by the bishop's surveyor, the bishop shall make an order stating the costs of the repairs for which the late incumbent's estate is liable, and the sum stated in the order is to be a debt (*c*), which debt is payable *pari passu* with the other debts of the deceased (*d*). The action being now in form an action of debt, it seems doubtful whether ecclesiastical dilapidations can any longer be regarded as coming within the category of torts. The new incumbent upon recovery of the money is not now entitled to retain it for his own use, but is bound to pay it over to the Governors of Queen Anne's Bounty (*e*), to be applied for repairs.

(*a*) As to this action, see the judgment of Lord Denman in *Mason* v. *Lambert*, (1848) 12 Q. B. 795, 799.

(*b*) 34 & 35 Vict. c. 43.

(*c*) s. 36.

(*d*) *In re Monk*, (1887) 35 Ch. D. 583,

(*e*) s. 37.

CHAPTER XIV.

NUISANCE.

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Private nuisance defined.

NUISANCES are of two kinds, private and public. A private nuisance has been defined to be "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass" (*a*). It includes all kinds of damage arising from water (other than that caused in certain cases by mine water), filth, fire, gases, or other noxious things being caused or permitted to pass from the defendant's land on to the plaintiff's (*b*), all damage arising from improper use of a natural stream, damage arising from the excavation of the defendant's land, and the consequent withdrawal of the support to which the plaintiff's land is entitled, obstructions of easements of all kinds, and injuries to rights of profit *à prendre*.

But to amount to a nuisance the degree of hurt or annoyance must in each case be substantial. Thus where the plaintiff complained that the trees and other vegetation on his land were damaged by the escape of fumes from the defendant's smelting works, the jury were held to have been rightly directed "that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore in an action for nuisance to property, arising from noxious vapours, the injury, to be actionable, must be such as visibly to

(*a*) Stephen's Com. 1st Ed. Vol. 3, p. 499.

(*b*) As to the duty to prevent damage of this kind, see below, pp. 425, *sqq*.

diminish the value of the property and the comfort and enjoyment of it" (*a*).

Nuisance to stream.

With regard to interferences with the water of a natural stream, however, it is to be observed that there is one case in which the injury even though substantial will not amount to an actionable nuisance. It has been laid down that, in the course of what is termed the ordinary use of water, the use, that is to say, *ad lavandum et potandum*, for domestic purposes and for cattle, a riparian owner may without regard to the necessities of the lower owners take water from the stream without limit, even to the exhaustion of the whole supply (*b*), and the rule is usually so stated; but the proposition has been doubted (*c*). If by the use of the water for any other purposes, such as irrigation, or manufacture, or the supply even for domestic use of persons whose premises are situate on land not riparian, an upper riparian owner sensibly diminishes the volume of the stream, he will be liable as for a nuisance (*d*). The law on this subject is thus admirably summarised in Kent's Commentaries (*e*): "Every proprietor of lands on the banks of a" (natural) "river has . . . an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run" (*currere solebat*) "without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. . . . Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." Moreover,

(*a*) *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H. L, C. 642

(*b*) *Per* Lord Kingsdown, *Miner* v. *Gilmour*, (1858) 12 Moore, P. C. p. 156.

(*c*) *Lord Norbury* v. *Kitchin*, (1863) 9 Jur. N. S. 132.

(*d*) *McCartney* v. *Londonderry & Lough Swilly R.*, (1904) A. C. 301; and see *Swindon Waterworks Co.*, v. *Wilts & Berks Canal Navigation Co.*, (1875) L. R. 7 H. L. 697; *per* Parke, B., *Embrey* v. *Owen*, (1851) 6 Exch. p. 371.

(*e*) 12th Ed. Vol. 3, p. 439.

a riparian proprietor will be liable as for a nuisance if he substantially pollutes the stream by discharging foul matter into it (*a*), or raises its temperature by abstracting water from it for the purpose of his mill and then returning it into the stream again in a heated state (*b*), or interferes with the regularity of the flow by temporarily penning back the water (*c*). Nor is a plea that the defendants use every reasonably practicable and available means of rendering the pollution harmless any excuse in law (*d*). Although the right to have water flowing above ground in a natural stream continue so to flow is a natural incident of ownership of riparian land, and a similar right pertains to subterranean water flowing in an ascertained channel (*e*), there is no corresponding natural right in respect of percolating water flowing underground in no defined channel (*f*), or in a channel which, though defined, can only be ascertained by excavation (*g*), nor can such a right be acquired by long enjoyment (*h*). Every person may (subject to one limitation) appropriate the whole of the water percolating under his land, "even though the consequence may be that he takes not only the water which at first was under his property, but all the adjoining water which by natural force comes under his land when he has taken that which was there in the first instance" (*i*). Therefore an action will not lie for intercepting the percolation of water into the plaintiff's well (*k*), or into a running stream (*l*), nor for causing water which had already collected on the plaintiff's land and was stationary there, as in a well, to percolate away from it (*m*).

Percolating water.

(*a*) *Wood* v. *Waud*, (1849) 3 Exch. 748; *West Riding of Yorkshire Rivers Board* v. *Preston & Sons*, (1905) 92 L. J. 24; *Hodgkinson* v. *Ennor*, (1863) 4 B. & S. 229. Nor is it necessary for a plaintiff to adduce proof of actual damage: *Pennington* v. *Brinsop Hall Coal Co.*, (1877) 5 Ch. D. 769.

(*b*) *Mason* v. *Hill*, 1832–3) 5 B. & Ad. 1.

(*c*) *Sampson* v. *Hoddinott*, (1857) 1 C. B. N S. 590.

(*d*) *Midlothian County Council* v. *Pumpherston Oil Co.*, (1904) 6 F. 387, Ct. of Sess.

(*e*) *Chasemore* v. *Richards*, (1859) 7 H. L. C. 349.

(*f*) *Acton* v. *Blundell*, (1843) 12 M. & W. 324; *Corporation of Bradford* v. *Pickles*, (1895) A. C. 587.

(*g*) *Bradford Corporation* v. *Ferrand*, (1902) 2 Ch. 655.

(*h*) *Chasemore* v. *Richards*, (1859) 7 H. L. C. 349.

(*i*) *Per* Cotton, L.J., *Ballard* v. *Tomlinson*, (1885) 29 Ch. D. p, 123.

(*k*) *Acton* v. *Blundell*, (1843) 12 M. & W. 324.

(*l*) *Chasemore* v. *Richards*, (1859) 7 H. L. C. 349.

(*m*) *New River Co.* v. *Johnson*, (1860) 2 E. & E. 435; *Acton* v. *Blundell*, (1843) 12 M. & W. 324.

Nor will the motive with which the defendant so intercepts the water be material. Thus if a landowner sink a tunnel on his land, the effect of which is to cut off the undergound water supply from his neighbour, no action will lie, even though his object was not to benefit his own land but to extort money from his neighbour by forcing him to buy him out at his own price (*a*). A distinction however has been drawn, though on what grounds is not clear, between the case of draining water out of a well and that of draining it out of a running stream, and the latter has been held to be actionable (*b*); but this forms the sole limitation upon the otherwise absolute right of an owner of land by sinking wells in his own soil to drain his neighbour's land with impunity.

The reason why a right to have percolating water flow as it was wont to flow cannot be acquired by long enjoyment, seems to be founded upon the indefiniteness of the right, and the inability of the servient owner to prevent the user by which the right is claimed to be acquired (*c*).

Fouling underground water supply.

But although there can be no property in percolating water, it seems clear that an action will lie against one who allows his sewage to foul the water supply existing in the underground strata, so that the water reaches the plaintiff in an impure condition (*d*). Whether a person is deprived of his right of appropriation of underground water by reason of his neighbours having exhausted the supply, or by reason of their having contaminated it, the result is practically the same; but in the one case such deprivation is actionable, in the other it is not. Possibly the grounds of this distinction may be that the objections which were urged in *Chasemore* v. *Richards* (*e*), against holding that the prevention of percolating water from coming to the plaintiff's land could give rise to a cause of action, do not apply with equal force to holding that the fouling of such water could do so. Rain-water falls from heaven indefinitely over the earth's surface, manure does not, and there is not the same difficulty in tracing

(*a*) *Corporation of Bradford* v. *Pickles*, (1895) A. C. 587. See above, p. 18.

(*b*) *Grand Junction Canal Co.* v. *Shugar*, (1871) L. R. 6 Ch. 483.

(*c*) See *per* Wightman, J., *Chasemore* v. *Richards*, (1850) 7 H. L. C. 349.

(*d*) *Womersley* v. *Church*, (1867) 17 L. T. N. S. 190; *Snow* v. *Whitehead* (1884) 27 Ch. D. 588; *Ballard* v. *Tomlinson*, (1885) 29 Ch. D. 115.

(*e*) *Supra*.

manure or other impurities to their source as in tracing the cause of the diminution of the water supply (*a*).

Fouling artificial watercourse.

In this respect an artificial watercourse above ground stands on the same footing as underground percolating water. A person through whose land the watercourse flows, although he may have no right to have the flow continue, is entitled to sue for a nuisance any owner higher up the stream who pollutes it so as to deprive him of the beneficial enjoyment of the water whilst it continues to run (*b*).

Withdrawal of support.

The mere withdrawal of the support to which a person's land is entitled, whether as a natural incident of ownership or as an easement, from the land of the adjoining owner, is not of itself a nuisance; there is nothing *per se* wrongful in the excavation or removal of the supporting soil; it only becomes wrongful if and when a subsidence of the plaintiff's soil follows (*c*). And further, a subsidence to create a cause of action must be something more than merely nominal, it must be appreciable (*d*).

The right of support is limited to support by soil, it does not extend to the hydrostatic pressure afforded by underground water percolating through the soil; and therefore one who by draining his own land withdraws from an adjoining owner the support of water theretofore lying beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the damage inflicted (*e*). To this rule an exception is created by statute in certain cases of subsidence caused by brine pumping operations (*f*). The general principle involved in the above proposition will not, however, apparently, be extended by the Courts to cases in which the withdrawal of support results in a subsidence of the adjacent surface by the oozing out of wet

(*a*) As to the pollution of water supply by a gas company, acting under statutory powers, see *Batcheller* v. *Tunbridge Wells Gas Co.*, (1901) 84 L. T. 765; and as to the fouling of *surface water* see *Gibbings* v. *Hungerford* (1904) 1 Ir. R. 211 C. A.

(*b*) *Wood* v. *Waud*, (1849) 3 Exch. p. 779.

(*c*) *Backhouse* v. *Bonomi*, (1858–61) 9 H. L. C. 503; *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. 127; *Crumbie* v. *Wallsend Local Board*, (1891) 1 Q. B. 503.

(*d*) *Smith* v. *Thackerah*, (1866) L. R. 1 C. P. 564. This is apparently all that that case was intended to decide, see above, p. 133. And see *per* Collins, J., in *Attorney-General* v. *Conduit Colliery Co.*, (1895) 1 Q. B. 301.

(*e*) *Popplewell* v. *Hodkinson*, (1869) L. R. 4 Ex. 248.

(*f*) 54 & 55 Vict. c. 40.

sand, silt, or other partially liquid substance (*a*). And in the case of the *Trinidad Asphalt Co.* v. *Ambard* (*b*), an injunction was granted and damages recovered by the plaintiffs from the defendants, who, by reason of the removal of lateral support, caused a semi-fluid substance of commercial value to ooze out on to their own land, where it was appropriated by them.

Again, the right of support, apart from any easement to have a greater degree of support, is limited to support afforded to land in its natural state, that is to say, to land on the one hand unburdened with the weight of buildings, reservoirs of water, or other artificial erections which would tend to increase the natural downward or lateral thrust (*c*); and, on the other hand, unweakened by any artificial excavation on any intervening strip of land (whether belonging to the plaintiff or a third party) lying between it and the soil from which the right of support is claimed (*d*). But if, in an action against the adjoining owner for removing the support afforded to the soil under the plaintiff's house and thereby causing the plaintiff's house to fall, it be proved that the land on which the house stood would have subsided appreciably even if it had been unburdened with the weight of the house (*e*), the plaintiff is entitled to recover in respect of the damage to the house, although it may be modern and no right of support for it has been acquired (*f*). Moreover, it has been held, though possibly the decision is open to exception, that an express reservation by a vendor of the right of lateral severance, in a conveyance of one of two adjacent properties, will not disentitle the purchaser to damages should the vendor subsequently to the sale (by reason of such lateral severance of support), in fact, let the purchaser's property down (*g*). An owner of a modern house which *de facto* enjoys the support of the adjoining soil, though not entitled as against the adjoining

(*a*) *Jordeson* v. *Sutton, &c., Gas Co.*, (1899) 2 Ch. 217, C. A.

(*b*) (1899) A. C. 594, P. C.

(*c*) *Per* Lord Tenterden, *Wyatt* v. *Harrison*, (1832) 3 B. & Ad. p. 876.

(*d*) *Corporation of Birmingham* v. *Allen*, (1877) 6 Ch. D. 284.

(*e*) *Smith* v. *Thackerah*, (1866) L. R. 1 C. P. 564.

(*f*) *Brown* v. *Robins*, (1859) 4 H. & N. 186; *Stroyan* v. *Knowles*, (1861) 6 H. & N. 454.

(*g*) *Richards* v. *Harper*, (1866) L. R. 1 Ex. 199.

owner not to have that support withdrawn, is so entitled as against a wrong-doer (*a*).

Nuisance to ancient lights.

With regard to the access of light to ancient windows the extent of the right is "to have that amount of light through the windows of a house which is sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop, or other place of business" (*b*).

Distinction between business premises and dwelling-houses.

There is, however, a great distinction between a nuisance of this description in the case of business premises and a similar nuisance in the case of a dwelling-house.

In the former, the question is whether the plaintiff is prevented from carrying on his business as beneficially and as profitably as before the defendant entrenched on his light; in the latter, the question is, whether the plaintiff's house has to a sensible degree been rendered less fit for habitation than it was before; that is to say, whether the light has been so materially diminished as to render those particular portions of the dwelling actually interfered with by the obstruction complained of appreciably less comfortable and convenient than they were.

In either case, when the nuisance is such as to give a right of action, the question as to whether the remedy shall be in damages, or by mandatory injunction, apparently depends on the degree of obstruction.

If the damage be irremediable, it seems probable that as a mandatory injunction to abate the nuisance is the only adequate remedy it will be granted as a matter of course. But, on the other hand, if the discomfort or pecuniary loss, though considerable, is capable of appraisement, and is not such as to render the business premises or residence absolutely unfitted

(*a*) *Jeffries* v. *Williams*, (1850) 5 Exch. 792. Presumably the same principle would apply to modern lights where blocked by a hoarding on a highway causing a nuisance. But the point has never arisen for decision.

(*b*) *Per* James, L.J., *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. p. 811. See too *Parker* v. *Smith*, (1832) 5 C. & P. 438; *Wells* v. *Ody*, (1836) 7 C. & P. 410; *Dent* v. *Auction Mart Co.*, (1866) L. R. 2 Eq. p. 245; *Ambler* v. *Gordon*, (1905) 1 K. B. 417; and *Colls* v. *Home & Colonial Stores*, *infra*, next page.

for comfortable and convenient or profitable occupation, the remedy will be probably in damages (*a*).

In one case, indeed, Malins, V.-C., suggested that if a person can show enjoyment of an extraordinary amount of light for twenty years to the knowledge of the servient owner, he will be entitled to the access of an amount of light equal to that which he has enjoyed, and not merely to an amount sufficient for all ordinary purposes (*b*). This *dictum*, however, seems opposed to the principle of the cases above cited, and it is apprehended that the servient owner's knowledge of the user could make no difference.

There seems at one time to have existed a notion that an obstruction which left forty-five degrees of sky unobscured could not amount to an actionable interference with the plaintiff's lights. This notion, which seems to have arisen from a reference to the Metropolitan Building Act, an Act passed wholly *alio intuitu*, has been pronounced to be a mistaken one (*c*). Whether there has been a substantial obstruction or not is a question of fact in each case. But at the same time it appears that, "if forty-five degrees are left, this is some *primâ facie evidence* of the light not being obstructed to such an extent as to call for the interference of the Court—evidence which requires to be rebutted by direct evidence of injury and not by the mere exhibition of models (*d*).

When once it is established that the interference with the plaintiff's light will produce substantial damage, the plaintiff will be *primâ facie* entitled to an injunction in general terms without referring to the angle of incidence of the light, unless there is some special evidence justifying the insertion of such a clause (*e*). Moreover, where evidence is adduced that the obstruction is actually productive of substantial loss, the plaintiff

(*a*) *Kine* v. *Jolly*, (1905) 1 Ch. 481, C. A.; *Higgins* v. *Betts*, (1905) 2 Ch. 210.

(*b*) *Lanfranchi* v. *Mackenzie*, (1867) L. R. 4 Eq. pp. 430, 431; and see *Ruscoe* v. *Grounsell*, (1903) 89 L. T. 426.

(*c*) *Per* Cotton, L.J., *Parker* v. *First Avenue Hotel Co.*, (1883) 24 Ch. D. p. 289; *Home & Colonial Stores* v. *Colls*, (1902) 1 Ch. 302, C. A. Reversed on appeal by House of Lords, *sub nom. Colls* v. *Home & Colonial Stores*, (1904) 20 T. L. R. 475.

(*d*) *Per* Lord Selborne, *City of London Brewery Co.* v. *Tennant*, (1873) L. R. 9 Ch. p. 220.

(*e*) *Parker* v. *First Avenue Hotel Co.*, (1883) 24 Ch. D. 282.

is, almost as a matter of course, entitled to an injunction, damages not constituting a sufficient vindication of his legal right (*a*). And a similar rule applies where there is a threatened interference with a clearly vested legal right to an easement of light (*b*).

Nuisances productive of personal discomfort.

Acts which are productive of mere personal discomfort may amount to an actionable nuisance, as, for instance, where the defendant creates stenches by the carrying on of an offensive manufacture or otherwise (*c*), or causes excessive volumes of smoke to pass from his chimneys on to the plaintiff's property (*d*), or makes unreasonable noises upon his land (*e*), or impairs the amenity of a neighbourhood by vibration and noise (*f*), even though the nuisance be of a temporary character (*g*), or uses a building as a hospital for infectious diseases whereby the adjoining owners live in perpetual dread of infection (*h*), or interferes with the quiet enjoyment of the inhabitants of a residential neighbourhood by holding horse-races on Sunday (*i*), or injures adjacent property by the collection of crowds (*k*), or by watching and besetting a man's house compels him to do or not to do that

(*a*) *Jordeson* v. *Sutton, &c., Gas Co.*, (1899) 2 Ch. 217, C. A.

(*b*) *Cowper* v. *Laidler*, (1903) 2 Ch. 337. For recent decisions on "ancient lights," see *Easton* v. *Isted*, (1903) 1 Ch. 405, C. A.; *Quick* v. *Chapman*, (1903) 1 Ch. 659, C. A.; *Godwin* v. *Schweppes, Ltd.*, (1902) 1 Ch. 926; *Colls* v. *Home & Colonial Stores, supra*.

(*c*) Brick-burning, *Walter* v. *Selfe*, (1851) 4 De G. & Sm. 315; *Bamford* v. *Turnley*, (1860) 3 B. & S. 62; soap-boiling, *Rex* v. *Pierce*, (1683) 2 Show. 327; effluvia from factory chimney, *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409; keeping swine, *Aldred's case*, (1610) 9 Rep. 57 b; fat-melting, *Attorney-General* v. *Cole*, (1901) 1 Ch. 205.

(*d*) *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409; and see *McNair* v. *Baker*, (1904) 1 K. B. 208; *Tough* v. *Hopkins*, (1904) 1 K. B. 805. All offences under s. 24 of the Public Health (London) Act, 1891.

(*e*) Revolving machinery of factory, *Crump* v. *Lambert, supra;* using ground-floor of a house in a residential street as a stable for horses, *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467; holding circus performances, involving music and shouting, *Inchbald* v. *Robinson*, (1869) L. R. 4 Ch. 338; ringing chapel bell, *Soltau* v. *De Held*, (1851) 2 Sim. N. S. 133; firing on rifle range, *Hawley* v. *Steele*, (1877) 6 Ch. D. 521.

(*f*) *Knight* v. *Isle of Wight Electric Light & Power Co.*, (1904) 73 L. J. Ch. 299; *Rushmer* v. *Polsue & Alfieri, Ltd.*, (1905) 21 T. L. R. 183.

(*g*) *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707.

(*h*) *Metropolitan Asylum District* v. *Hill*, (1881) 6 App. Cas. 193. But see *Att.-Gen.* v. *Nottingham Corporation*, (1904) 1 Ch. 673; *Att.-Gen.* v. *Rathmines & Pembroke Hospital Board*, (1904) 1 Ir. R. 161, C. A.

(*i*) *Dewar* v. *City & Suburban Racecourse Co.*, (1899) 1 Ir. R. 345.

(*k*) *Chase* v. *London County Council*, (1898) 62 J. P. 184.

which it is lawful for him not to do or to do (*a*), or causes excessive heat to pass into an adjacent tenement comprised in the same block of buildings (*b*). And generally a right of action accrues whenever there is a non-natural or exceptional user of property resulting in substantial damage or annoyance to neighbouring residents (*c*). Nor is there apparently, at least in Great Britain, any right to the reasonable and proper use of business premises for an admittedly offensive trade when such reasonable user constitutes a substantial nuisance (*d*), though these latter propositions are subject to certain qualifications, discussed in the ensuing pages. But the general requirement that a nuisance, to be actionable, should be substantial, applies with even greater force to cases in which the nuisance complained of is one causing personal discomfort than where it causes an injury to the land itself. When it is said that a house-owner is entitled to have the air in his house untainted and unpolluted by any acts of his neighbour, by that is meant that he is entitled to have "not necessarily air as fresh, free and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence" (*e*). Moreover, the discomfort must be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person occupying the plaintiff's premises, irrespective of his position in life, age, or state of health; it must be "an inconvenience naturally interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" (*f*).

How far locality affects the question of nuisance or no nuisance.

It was at one time thought that interference with the enjoyment of property, produced by the carrying on of a noxious trade, could not be actionable, however substantial the annoyance

(*a*) *Lyons* v. *Wilkins*, (1899) 1 Ch. 255.

(*b*) *Sanders-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373.

(*c*) *Eastern Telegraph Co. Ltd.* v. *Cape Town Tramways Co., Ltd.*, (1902) A. C. 381, P. C.

(*d*) *Attorney-General* v. *Cole*, (1901) 1 Ch. 205.

(*e*) *Per* Knight Bruce, V.-C., *Walter* v. *Selfe*, (1851) 4 De G. & Sm. p. 321.

(*f*) *Ibid.* p. 322.

might be, if, having regard to the public interests, and apart from the consideration of the individual annoyance to the plaintiff, it was carried on in a convenient place (*a*). And it was apparently upon this principle, that Lord Hardwicke, in *Baines* v. *Baker* (*b*), refused to grant an injunction to restrain the erection of a small-pox hospital in Coldbath Fields, being of opinion that such a hospital must not be far from a town, because those attacked with such a disorder would not be in a condition to be carried far. But that doctrine was overruled by the Exchequer Chamber in *Bamford* v. *Turnley* (*c*), where it was laid down that the mere fact that the place where the trade complained of was carried on was convenient, in the sense that it was for the convenience of the general public that it should be carried on there, was no answer to an action. And the law as so laid down has since been uniformly approved (*d*). But although the fact that the locality in which the trade or manufacture complained of is carried on is convenient, in the sense that it is devoted to trades or manufactures of that class, is *per se* no justification of a person carrying it on to the substantial annoyance of his neighbour, it is nevertheless an element in the case which the jury are bound to take into consideration in determining whether the annoyance amounts to an actionable nuisance. And this is especially the case where the nuisance complained of is one productive only of personal discomfort. A person who lives in the heart of a large manufacturing town cannot reasonably expect the same purity of air or freedom from noise as in a secluded country district. "The affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and in all actions for discomfort, the law must regard the principle of mutual adjustment; and the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, is as untenable as the notion that, if the act complained of was done in a convenient time and place,

(*a*) *Hole* v. *Barlow*, (1858) 4 C. B. N. S. 334.

(*b*) (1752) Ambl. 158; and see *Attorney-General* v. *Nottingham Corporation*, (1904) 1 Ch. 673; *Attorney-General* v. *Rathmines & Pembroke Hospital Board*, (1904) 1 Ir. R. 161, C. A. But see *contra*, *Metropolitan Asylum District* v. *Hill*, (1881) 6 App. Cas. 193.

(*c*) (1860) 3 B. & S. 62.

(*d*) See *Shotts Iron Co.* v. *Inglis*, (1882) 7 App. Cas. 518.

it must therefore be justified, whatever was the degree of annoyance that was occasioned thereby" (*a*). Thus, Rolfe, B., in an anonymous case (*b*), where the action was for annoyance arising from smoke in the town of Shields, and it was proved that the smoke did in some degree cause annoyance to the plaintiff, directed the jury that they "must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields." So again in *Sturges* v. *Bridgman* (*c*), where the nuisance complained of was that of a noisy trade, Thesiger, L.J., laid it down that "whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong" (*d*).

Nor is the question of locality altogether immaterial even in the case of nuisances producing physical damage to property. Thus in *St. Helen's Smelting Co.* v. *Tipping* (*e*), where the plaintiff complained of damage caused to his trees by the noxious fumes from the defendant's smelting works, the judge was held to have rightly directed the jury that they were bound to take into consideration, along with the other circumstances, the fact that the *locus in quo* was situate in the middle of a manufacturing district studded with tall chimneys, and that there were several alkali works in the immediate vicinity of the plaintiff's property. Still the character of the neighbourhood is less material in such a case than in one of mere personal discomfort. "The submission which is required from persons living in society to that

(*a*) *Per* Erle, C.J., *Carey* v. *Ledbitter*, (1863) 13 C. B. N. S. p. 476.

(*b*) Cited in *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. p. 653.

(*c*) (1879) 11 Ch. D. p. 865. See too *Ball* v. *Ray*, (1873) L. R. 8 Ch. pp. 470–1.

(*d*) But see *Rushmer* v. *Polsue & Alfieri*, (1905) 21 T. L. R. 183.

(*e*) (1865) 11 H. L. C. 642.

amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of property" (*a*).

So again in the case of a user involving interference with water rights, ancient lights, or other easements, the degree of interference which will be actionable will to some limited extent probably depend upon the nature of the locality. Thus, although in general a proprietor of land on the bank of a natural stream may complain if a higher riparian owner, in using the water for extraordinary (as opposed to domestic) purposes, diminishes the volume or purity to a substantial extent, yet it has been doubted whether, owing to the development of trade in a particular district, the use of water in such district for trade purposes may not under certain circumstances be regarded as an ordinary user (*b*), so as to disentitle a lower owner to complain even of a sensible diminution in the supply. And it may also be doubted whether the fact of the district being devoted to trades may not also diminish to some extent the degree of purity to which the lower riparian owners will be entitled. Still at the most it can only be an element in the case (*c*). On the other hand, where it was attempted to be set up as a defence to an action against a higher riparian owner for discharging soapsuds into the stream, that the plaintiffs had suffered no damage because the water, before it reached the defendant's mill, was already so polluted by other mills and dye-works higher up the stream, that the pollution by the defendant did not make the water less applicable to useful purposes than it was before, the Court held that this fact afforded no defence, for "the defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plain-

(*a*) *Per* Lord Westbury, (1865) 11 H. L. C. at p. 650.

(*b*) *Per* Brett, M.R., *Ormerod* v. *Todmorden Mill Co.*, (1883) 11 Q. B. D. p. 168.

(*c*) A plea that the defendants "were using every reasonably practicable and available means of rendering the pollutions harmless" has been held no defence, *Midlothian County Council* v. *Pumpherston Oil Co., Ltd.*, (1904) 6 F. 387, Ct. of Sess.

tiffs, who would otherwise have had in that case pure water, would be compellable to submit to this nuisance, which then would do serious damage to them" (*a*).

So, again, in dealing with the question whether an obstruction of light is sufficiently substantial to amount to an actionable nuisance, the locality in which the house is situate is a matter which may be considered. The authorities, however, on the subject are conflicting. In *Clarke* v. *Clark* (*b*) Lord Cranworth is reported to have said that "persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country," and that the Court will take the fact of the house being so situate in a populous town into consideration in estimating the damage caused by obstructing an ancient light. But in the subsequent case of *Yates* v. *Jack* (*c*), the same judge took the opposite view, and referred to the fact of the Prescription Act having expressly repealed the customs of certain cities, whereby the owners of houses were permitted to raise their houses and thereby obstruct their neighbours' lights with impunity, as indicating that in the opinion of the Legislature no distinction in this respect was to be drawn between towns and country districts. And this latter view was adopted by Page-Wood, V.-C., in *Dent* v. *Auction Mart Co.* (*d*), where he treated the *dictum* in *Clarke* v. *Clark* as overruled. In *Kelk* v. *Pearson* (*e*), however, James, L.J., seems to have preferred the case of *Clarke* v. *Clark*, and to have intimated that the Court would have been less ready to interfere with a similar degree of obstruction of light occurring in a street in the city of London, where the defendant was using his house for city purposes, than in the case before them, which was that of open building land at Notting Hill. It has, however, been held, by the Court of Appeal, in the more recent case of *Warren* v. *Brown* (*f*), that the question of position or environment is of secondary importance

(*a*) *Wood* v. *Waud*, (1849) 3 Exch. 748: *Crossley* v. *Lightowler*, (1867) L. R. 2 Ch. 478. See also *Harrington (Earl of)* v. *Corporation of Derby*, (1905) 1 Ch. 205.

(*b*) (1865) L. R. 1 Ch. p. 18.

(*c*) (1866) L. R. 1 Ch. 299.

(*d*) (1866) L. R. 2 Eq. 238.

(*e*) (1871) L. R. 6 Ch. 809.

(*f*) (1902) 1 K. B. 15. But see *Colls* v. *Home & Colonial Stores*, (1904) 20 T. L. R. 475, H. L.; and *ante*, p. 386.

in cases where an occupier of business premises in a crowded neighbourhood, who requires for the particular purposes of his trade an exceptional amount of light, has enjoyed such an easement for the requisite statutory period.

Nuisance from heat of stove.

It has been decided that the maintenance in a house of an ordinary kitchen stove, the heat of which rendered the cellar of the adjoining house unfit for storing wine, was restrainable as a nuisance (*a*), notwithstanding that the judge found that the defendants in maintaining the stove were making a reasonable use of their house. But the correctness of that decision may be doubted, although there can be no "reasonable use" of that which is found, as a fact, to constitute an actionable nuisance (*b*). It is apprehended, that the question as to whether the passage of heat from one house to another amounts to a nuisance or not, must depend entirely upon the amount of the heat, and not upon the peculiar use to which the plaintiff chooses to devote his premises (*c*).

Temporary nuisance.

The fact of a nuisance being temporary only is no answer to an action for damages, if the nuisance is in other respects substantial (*d*). Thus, a nuisance caused by brick-burning cannot be justified on the ground that it is only temporary in order to build a house on the land (*e*), though the temporary character of the nuisance may be ground for refusing an injunction (*f*).

Special damage from public nuisance actionable.

Although for a public nuisance (*g*), so far as it affects the public generally, the proper remedy is indictment, yet an individual who suffers an especial damage more than the rest

(*a*) *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685.

(*b*) *Attorney-General* v. *Cole*, (1901) 1 Ch. 205; and see *Knight* v. *Isle of Wight Electric Light Co.*, (1904) 73 L. J. Ch. 299.

(*c*) *Sanders-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373. As to whether motive can ever make a nuisance actionable where it would not otherwise be so, see above, p. 19.

(*d*) *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707.

(*e*) *Per* Bramwell, B., *Bamford* v. *Turnley*, (1860) 3 B. & S. p. 84.

(*f*) *Duke of Grafton* v. *Hilliard*, (1736) cited in *Attorney-General* v. *Cleaver*, (1811) 18 Ves. p. 219; *Swaine* v. *Great Northern R. Co.*, (1864) 4 De G. J. & S. 211; *Harrison* v. *Southwark & Vauxhall Water Co.*, (1891) 2 Ch. 409. In the last case indeed damages were claimed as ancillary to the injunction, but no damage was proved.

(*g*) As to what constitutes a public nuisance, see below, p. 405.

of the king's subjects may have an action in respect of that special damage (*a*).

What is sufficient special damage.

In *Iveson* v. *Moore* (*b*), where the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, and the coal was deteriorated by the delay, the special damage was held sufficient to support the action, it being the primary object of a public highway to afford free passage to the public (*c*). So, too, in *Maynell* v. *Saltmarsh* (*d*). where the plaintiff was prevented by the defendant's obstruction from carrying his corn, whereby the corn was damaged by the rain; in *Hart* v. *Basset* (*e*), where the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and in *Rose* v. *Miles* (*f*), where the plaintiff, being prevented from navigating his barges on a public navigable creek, was obliged to convey his goods overland at considerable expense, the actions were held to be maintainable. If by reason of some obstruction the access from the highway to the plaintiff's premises abutting thereon be cut off, and the value of the premises be consequently diminished, such deprivation of access will be sufficient special damage (*g*). And the same principle applies to a navigable river.

A riparian proprietor on such a river, in addition to the right connected with navigation to which he is entitled as one of the public, has, in virtue of his property, a right of access to the stream, for an interference with which an action will lie (*h*). Where the plaintiff kept a coffee-house in a narrow street, and the defendants caused horses and vans to stand in the street outside the door of the plaintiff's shop for an unreasonable length of time, so that the access to his shop was obstructed and his custom fell off in consequence, he was held entitled to maintain

(*a*) *Iveson* v. *Moore*, (1699) Lord Raym. 486. As to the *quantum* of special damage which will constitute a ground of action see *Mayo* v. *Seaton Urban District Council*, (1904) 68 J. P. 7.

(*b*) *Supra.*

(*c*) *Attorney-General* v. *Brighton & Hove Co-operative Supply Association*, (1900) 1 Ch. 276.

(*d*) (1665) 1 Keb. 847.

(*e*) (1681) T. Jones, 156.

(*f*) (1815) 4 M. & S. 101. See cases collected in judgment of Erle, C.J., in *Ricket* v. *Metropolitan R. Co.*, (1864–5) 5 B. & S. p. 159.

(*g*) *Metropolitan Board of Works* v. *McCarthy*, (1874) L. R. 7 H. L. 243.

(*h*) *Lyon* v. *Fishmongers' Co.*, (1876) 1 App. Cas. 662.

an action (*a*). But mere personal inconvenience caused by the plaintiff being delayed by an obstruction in the high-road, without pecuniary damage, will not suffice (*b*); nor is it enough that the plaintiff has been put to expense in exercising his right of abating the obstruction (*c*). And it is immaterial that the degree of personal inconvenience suffered may be in excess of that suffered by the rest of the public, for the court cannot enter into the consideration of the *quantum* (*d*). Lord Penzance's *dictum* in *Metropolitan Board of Works* v. *McCarthy* (*e*), that to entitle a person to an action for obstruction of a highway the damage suffered by him need not be different in kind from that suffered by his fellow-subjects, provided it be *more than* that suffered by them, seems hardly consistent with the authorities. In *Hubert* v. *Groves* (*f*), where by reason of an obstruction the plaintiff was compelled to carry his goods by a circuitous route, but no proof of any pecuniary loss resulting therefrom was given, the plaintiff was nonsuited. And in *Chaplin* v. *Westminster Corporation* (*g*) it was held that the erection of an electric standard in a public thoroughfare, opposite to the plaintiff's premises, whereby the transit of merchandise, from vans to warehouse across the public pathway, was impeded, afforded no ground for action.

Even if the plaintiff do suffer actual pecuniary damage from an obstruction of a highway, still he cannot bring an action for it unless that damage be the direct consequence of the obstruction. The fact that by reason of an obstruction, which does not interfere with the plaintiff's access from his premises to the street, the public traffic is diverted into another street, and the public in consequence cease to resort to his shop, whereby his profits fall off, is too remote to form a ground of action (*h*). The directness of the damage will in such case depend upon the

(*a*) *Benjamen* v. *Storr*, (1874) L. R. 9 C. P. 400. See too *Rose* v. *Groves*, (1843) 5 M. & G. 613.

(*b*) *Winterbottom* v. *Lord Derby*, (1867) L. R. 2 Ex. 316.

(*c*) (1867) L. R. 2 Ex. 316.

(*d*) *Caledonian R. Co.* v. *Ogilvie*, (1856) 2 Macq. 229; and see *Mayo* v. *Seaton Urban District Council*, (1904) 68 J. P. 7.

(*e*) (1874) L. R. 7 H. L. p. 263.

(*f*) (1794) 1 Esp. 148.

(*g*) *Chaplin & Co.* v. *Westminster Corporation*, (1901) 2 Ch. 329.

(*h*) *Per* Lord Chelmsford, *Ricket* v. *Metropolitan R. Co.*, (1864–7) L. R. 2 H. L. p. 196. The earlier case of *Wilkes* v. *Hungerford Market Co.*, (1835) 2 Bing. N. C. 281, *contra*, must be regarded as no longer law.

distance at which the point of diversion of traffic is from the plaintiff's door (*a*).

Obstructions to highway.

Any one who creates a source of danger upon a highway, as by digging a trench across it, or placing a log or pile of stones in the middle of the roadway, or driving piles into the bed of a navigable river, is responsible in damages to any member of the public who, while using the highway, without notice of the danger, suffers any injury by reason of the dangerous obstruction. Nor is thi responsibility confined to the actual tort-feasor, even though he be an independent contractor, it having been held "that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor" (*b*). Further, the occupier of premises immediately adjoining a highway is under a positive obligation to prevent them from getting into such a condition as to be dangerous to passengers in the highway. Thus to permit a house abutting on a highway to be ruinous and likely to fal down is a public nuisance (*c*), and if any portion of the house fall and injure a passer-by an action lies.

Again, it has been held to be negligence, sounding in damages, in case of accident, for a railway company to omit to provide a screen at an exit from their station which was especially exposed to danger from sparks emitted by passing engines (*d*).

Whether an obstruction of a highway is of such a degree as to amount to a nuisance is in each case a question of fact for the jury. It is no answer to a complaint of a nuisance by obstructing a public highway that the obstruction is for the convenience of the public generally. Thus a tramway in a town may be of great convenience to the general public, but if it be

(*a*) Cp. *Ricket* v. *Metropolitan R. Co.*, (1864–7) L. R. 2 H. L. 175, with *Benjamin* v. *Storr*, (1874) L. R. 9 C. P. 400.

(*b*) *Penny* v. *Wimbledon Urban Council*, (1898) 2 Q. B., Bruce, J., at p. 217, affirmed (1899) 2 Q. B. 72.

(*c*) *Reg.* v. *Watts*, (1703) 1 Salk. 357.

(*d*) *Atherton* v. *London & North-Western Ry.*, (1905) 21 T. L. R. 671, C. A.

laid down without the statutory authority, the owners will be liable for any damage it may cause to vehicles using the way (*a*); so, too, the projection of a quay into a public harbour to the hindrance of the navigation, is none the less a nuisance because that hindrance is counterbalanced by the advantages afforded by the quay in respect of other uses of the harbour (*b*).

Dangerous excavation adjoining high-road.

If, again, the occupier of the adjoining land suffer an excavation immediately adjacent to the highway to be unfenced so as to be dangerous to persons using the way, he will be responsible as for a nuisance (*c*). But the excavation must be substantially adjoining the way "so that a person walking upon it might by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, by the sudden starting of a horse, be thrown into the excavation" (*d*). When the excavation is made at some distance from the way, so that the person falling into it would be a trespasser upon the defendant's land before he reached it, the case is different, and for an accident happening under such circumstances there is no remedy (*e*). The excavation must substantially adjoin the highway; it is not enough that the jury think it dangerous (*f*). In one case, where a canal company made a canal parallel to a public footway, but separated from it by an open strip of land twenty-four feet wide over which there was no right of way, it was held that the canal did not substantially adjoin the footpath, and that the company were consequently under no obligation to fence it (*g*). Under certain exceptional circumstances, however, the liability for not fencing may be independent of the question whether the source of danger substantially adjoins the high-road, as where the *locus in quo* is the site of a former public way which has been diverted, and no gate has been placed across the entrance to the old way so as to

(*a*) *Reg.* v. *Train*, (1862) 2 B. & S. 640.

(*b*) *Rex* v. *Ward*, (1836) 4 A. & E. 384.

(*c*) *Barnes* v. *Ward*, (1850) 9 C. B. 392. On the same principle it may be questioned whether, where yew trees grow on land immediately adjoining a highway, even though they do not project over the boundary, there is not a duty on the owner to fence them so as to prevent cattle passing along the highway from browsing on them. See *per* Collins, J., in *Ponting* v. *Noakes*, (1894) 2 Q. B. p. 291.

(*d*) *Hardcastle* v. *South Yorkshire R. Co.*, (1859) 4 H. & N. p. 74.

(*e*) *Ibid.*

(*f*) *Hardcastle* v. *South Yorkshire R. Co.*, (1859) 4 H. & N. 67.

(*g*) *Binks* v. *South Yorkshire R. Co.*, (1862) 3 B. & S. 244.

indicate to passers-by that it has ceased to be a public thoroughfare (*a*); but the liability in such a case seems to be founded upon the implied representation that the *locus in quo* is a public road, and as such may be safely used.

Barbed wire.

The use of barbed wire as a fence to land so immediately adjoining a highway as to be likely to injure persons or animals lawfully using the highway is a nuisance (*b*).

Objects causing fear to horses.

Again, it is a nuisance to leave upon the side of a public way (*c*), or even upon private land immediately adjoining the way (*d*), any unusual object calculated to frighten horses passing along the road, and if a horse shies at such object, and damage results, the party placing the object in such position will be responsible. The fact that other horses besides the plaintiff's have shied at the particular object complained of is admissible in evidence to show that the object was likely to inspire fear, and as such was a public nuisance (*e*).

Dedication of highway subject to existing nuisance.

Although, if premises adjoining a highway be caused or permitted by their occupier to be in a condition dangerous to persons using the way, and such dangerous condition first came into existence after the way had been dedicated to the public, the occupier will be responsible for any damage that may result, yet if the existence of the source of danger was prior to or contemporaneous with the dedication of the highway, "the dedication must be taken to be made to the public, and accepted by them subject to the inconvenience or risk arising from the existing state of things" (*f*). Therefore where the defendant occupied a house and cellar in a public street, and the flap of the cellar projected slightly above the footway, and had so projected as long as living memory went back, and the plaintiff stumbled over the flap in the dark and was injured, the defendant was held not liable, on the ground that the jury ought to infer that the cellar had existed in that condition as long as the street, and that consequently there was nothing wrongful in maintaining it in such

(*a*) *Hurst* v. *Taylor*, (1885) 14 Q. B. D. 918.

(*b*) See the Barbed Wire Act, 1893, 56 & 57 Vict. c. 32.

(*c*) *Wilkins* v. *Day*, (1883) 12 Q. B. D. 110; *Harris* v. *Mobbs*, (1878) 3 Ex. D. 268.

(*d*) *Brown* v. *Eastern & Midland R. Co.*, (1889) 22 Q. B. D. 391.

(*e*) *Ibid.*

(*f*) *Per* Blackburn, J., *Fisher* v. *Prowse*, (1862) 2 B. & S. p. 780.

condition (*a*). Again, a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of the adjoining land for the purpose of depositing goods on it (*b*); but the mere fact that they have been accustomed as far back as living memory extends to make such use of the highway does not raise a conclusive presumption that the commencement of the user was anterior to the dedication; such presumption as it affords is liable to be rebutted by the other circumstances of the case (*c*).

When dangerous character of highway precludes dedication.

It appears, however, that there is no evidence of dedication where the user of a way by the public is, owing to particular circumstances, necessarily subordinated to an anterior private use fraught with especial danger to passengers. Where, however, there is no such special danger an attempt to close a way subsequently to dedication will be restrained by injunction (*d*).

Defective gratings, coal-plates, &c., in pavement.

Where the area or basement of a house in a public street receives its access of light and air through a grating in the footway, such grating having been placed there contemporaneously with the dedication of the street, the occupier of the house is under no obligation to keep the grating in repair if it be permanently fixed in the pavement so that he has no control over it, for under such circumstances the grating forms part of the pavement of the highway, and the highway authority are bound to repair it just as much as any other part of the pavement. Consequently, if by reason of such a grating being defective a passer-by fall through, and sustain injury, the occupier of the house for the benefit of which the grating exists is not responsible (*e*). But if the grating be movable and under the control of the occupier of the house, as where it is used for the purpose of affording access to a cellar, he will be bound to repair it (*f*), and if he fail to do so will be liable for the consequences. The same rule applies to the case of an ordinary coal-plate (*g*).

(*a*) *Fisher* v. *Prowse*, (1862) 2 B. & S. 770. See too *Cooper* v. *Walker*, (1862) 2 B. & S. 773.

(*b*) *Per Cur.*, *Morant* v. *Chamberlin*, (1861) 6 H. & N. p. 564; *Le Neve* v. *Vestry of Mile End Old Town*, (1858) 8 E. & B. 1054.

(*c*) *Morant* v. *Chamberlin*, (1861) 6 H. & N. 541.

(*d*) *Att.-Gen.* v. *London & South Western Ry.*, (1905) 69 J. P. 110.

(*e*) *Robbins* v. *Jones*, (1863) 15 C. B. N. S. 221.

(*f*) *Gwinnell* v. *Eamer*, (1875) L. R. 10 C. P. 658.

(*g*) *Pretty* v. *Bickmore*, (1873) L. R.

Nuisance arising from non-repair of highway.

To the general rule that an action will lie for any special damage caused by a nuisance in a highway there is an exception where the nuisance arises from the non-repair of the road. As already pointed out (*a*), in rural districts the duty to repair the highways rests on the rural district council (*b*), in urban districts on the urban district council (*c*), in boroughs on the corporation or council of the borough, and in the Metropolis by virtue of the London Government Act, 1899 (*d*), on the Metropolitan borough councils, with the exception, in the last case, of the Thames Embankment, responsibility for the repair of which rests on the London County Council as successor to the Metropolitan Board of Works (*e*). Prior to the enactment of the Local Government Act, 1894, and the other statutes referred to above, the duty to repair the highways rested ordinarily upon the parish, and for a breach of that duty the only remedy was an indictment of the inhabitants. Probably this liability to indictment is now transferred to district councils (*f*) by s. 25 of the Local Government Act, but if this be not so the liability of the inhabitants still continues. Apparently no action for damage resulting from non-repair will lie against either the inhabitants (*g*), their surveyor (*h*), or the district council. And the same immunity from action which attaches to the surveyor at common law attaches also to the corporate highway authority, to whom under the London Government Act, 1899, or the Local Government Act, 1894, the duties of the surveyor are transferred. Where, therefore, in consequence of the wearing away of the roadway, some hard substance, such as a fireplug, which has been lawfully placed in the highway, and which was originally level with the surface of the highway, is caused to project above the surface so as to be a nuisance, a passenger who suffers injury by falling over it has no remedy by action against any one (*i*).

8 C. P. 401; and see 57 Geo. III. c. cxxix., s. 7, M. A. Taylor's Act, 1817.

(*a*) p. .

(*b*) 56 & 57 Vict. c. 73, s. 25.

(*c*) *Ibid.* s. 21; and see Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 144.

(*d*) 62 & 63 Vict. c. 14.

(*e*) 51 & 52 Vict. c. 41, s. 40 (sub-s. 8).

(*f*) For indictment of a corporation, see *Reg.* v. *Corporation of Southport* (1901) 65 J. P. 184.

(*g*) *Russell* v. *Men of Devon*, (1788 2 T. R. 667.

(*h*) *Young* v. *Davis*, (1862) 7 H. & N. 760.

(*i*) *Moore* v. *Lambeth Waterworks Co.*, (1886) 17 Q. B. D. 462.

Nor does it make any difference in this respect that the highway authority happen also in some other character to be owners of the projecting substance (*a*). Where, however, the foreign substance becomes a nuisance, not by reason of the soil wearing away, but by reason of itself becoming defective, its owners are responsible for any damage that may arise from its defective condition, and none the less because the owners happen to be the local authority who have charge of the repair of the roads (*b*).

In *Chapman* v. *Fylde Waterworks Co.* (*c*), the stopcock of a service pipe leading from the defendants' main to a house was protected by a guard-box let into the pavement, the hinge of which box got out of repair, whereby a passer-by tripped over it and was injured. The apparatus could not be repaired without breaking up the pavement. It was held that whether the apparatus was the property of the defendants or not, as they alone had power to break up the street for purposes of repairing the apparatus, they were responsible for the injury. And a similar responsibility, on the ground of misfeasance, as opposed to non-feasance, devolves on a local authority when, subsequently to breaking up a highway, they restore its surface in such a negligent and perfunctory manner as to render it, after a few days, dangerous for ordinary traffic (*d*).

Extra-ordinary traffic on highways.

In the case of nuisances created on public highways by extraordinary and excessively heavy traffic, it may be laid down as a general—though not universal (*e*)—proposition that an injunction will not be granted against the tortious user of a road when the authority responsible for its repair are guilty of contributory negligence by omitting to execute necessary

(*a*) *Thompson* v. *Mayor, &c., of Brighton*, (1894) 1 Q. B. 332, overruling *Kent* v. *Worthing Local Board*, (1882) 10 Q. B. D. 118.

(*b*) *White* v. *Hindley Local Board*, (1875) L. R. 10 Q. B. 219 (grid of sewer giving way); *Blackmore* v. *Vestry of Mile End Old Town*, (1882) 9 Q. B. D. 451 (flap of water-meter worn smooth and slippery).

(*c*) (1894) 2 Q. B. 599.

(*d*) *Bull* v. *Shoreditch Borough*, (1903) 67 J. P. 37; 1 L. G. R. 81, C. A.; affirmed *sub. nom. Shoreditch Corporation* v. *Bull*, (1904) 90 L. T. 210, H. L.; and see *Clements* v. *Tyrone County Council*, (1905) 2 Ir. R. 542, C. A.; for cases of non-feasance see *Maguire* v. *Liverpool Corporation*, (1905) 1 K. B. 767, C. A; *Holloway* v. *Birmingham Corporation*, (1905) 3 L. G. R. 878.

(*e*) *Hemsworth Rural Council* v. *Micklethwaite*, (1904) 68 J. P. 345 (an action for damages).

repairs (*a*). Nor will an action for damages, for extraordinary user of a highway, ie under the Locomotive Acts (*b*) until the local authority have reinstated the road and executed the necessary repairs (*c*).

Obstruction to navigation by sunken vessel.

Where a vessel is sunk by accident in the tideway of a navigable river, the owner in order to prevent damage arising from other vessels striking against her is bound to give notice of the fact by lighting or buoying the spot where she has gone down (*d*). This done, his obligation is at an end, in all cases in which the vessel has sunk without any negligence on the part of those in charge of her; he is under no duty to remove her and prevent the continuance of the obstruction to the navigation. And even the obligation to give notice of the vessel's position continues only so long as the owner retains the possession and control of the vessel (*e*). If he sell her at the bottom of the water, the obligation passes to the purchaser (*f*); if he abandon her as not worth the expense of raising, the liability at common law ceases altogether (*g*). But under the Merchant Shipping Act, 1894 (*h*), the harbour or conservancy authority may remove the wreck if in such a position as to be a danger to the navigation, and sell it, and out of the proceeds of the sale reimburse themselves for the expenses of the removal; and this power of removal apparently imposes upon such authority an imperative duty to remove the obstruction as soon as notice is given of its existence (*i*). But under the Act, as at common law, an owner

(*a*) *Att.-Gen.* v. *Scott*, (No. 2) (1905) 2 K. B. 160, C. A.; 68 J. P. 502.

(*b*) 24 & 25 Vict. c. 70; 41 & 42 Vict. c. 77; 61 & 62 Vict. c. 29.

(*c*) *Little Hulton Urban Council* v. *Jackson*, (1904) 68 J. P. 451.

(*d*) *The Snark*, (1900) P. 105, C. A.

(*e*) *Brown* v. *Mallett*, (1848) 5 C. B. 599.

(*f*) *White* v. *Crisp*. (1854) 10 Ex. 312.

(*g*) *Per* Brett, L.J., *The Douglas*, (1882) 7 P. D p. 160; *Barraclough* v. *Brown*. (1897) A. C. 615, H. L. (E.). And see *Arrow Shipping Co.* v. *Tyne Improvement Commissioners*, (1894) A. C. 508. In the former case, Brett, L.J., indeed suggested that the owner of a ship which sinks through his negligence is under no greater liability than if it had sunk without negligence. This view, however, is probably not correct. All the law lords in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners*, (1894) A. C. 508, laid stress on the fact that the vessel in that case had sunk without any negligence, as did also Maule, J., in *Brown* v. *Mallet*, (1848) 5 C. B. 599. Presumably an owner who has negligently caused his ship to become a wreck and a nuisance to the navigation cannot get rid of his liability by abandonment.

(*h*) 57 & 58 Vict. c. 60, s. 530.

(*i*) *Per* Cotton, L.J., (1882) 7 P. D. p. 160.

who has been in no default ceases to be the owner upon abandonment (*a*). And even where the owners do not abandon the wreck, if the harbour authorities undertake the duty of buoying and lighting, and neglect that duty, the owners are not responsible (*b*).

Doctrine of coming to nuisance exploded.

It was at one time thought, and there was much old authority for the proposition, that one who came to a private nuisance could not complain of it; that is to say, that if the nuisance had been in existence for ever so short a time before the plaintiff became possessed of the adjoining land, that was enough to justify its continuance. But this doctrine is no longer law (*c*). Nor does the fact that the matter complained of is a public nuisance preclude a particular person who is especially aggrieved from obtaining an injunction (*d*).

Prescriptive right to commit nuisance.

A right, however, to commit a private nuisance may perhaps be acquired by prescription as an easement (*e*), though it is submitted that this proposition is very doubtful, except where there has been such *laches* on the part of the individual complainant as will amount to personal acquiescence (*f*). Thus, it has been said, a man may acquire a right to obstruct the flow of the water in a natural watercourse (*g*), or, to impregnate the air with stenches from his candle factory (*h*), or to carry on a noisy trade to the nuisance of the adjoining owners (*i*) or to discharge rainwater from his eaves on to his neighbour's land (*k*). And by the common law a man might prescribe to pollute a non-navigable stream (*l*) so far as the pollution only affected the lower riparian

(*a*) *Arrow Shipping Co.* v. *Tyne Improvement Commissioners*, (1894) A. C. 508.

(*b*) *The Utopia*, (1893) A. C. 492.

(*c*) *Elliotson* v. *Feetham*, (1835) 2 Bing. N. C. 134. See also *Bliss* v. *Hall*, (1838) 4 Bing. N. C. 183.

(*d*) *Soltau* v. *De Held*, (1851) 21 L. J. Ch. 153.

(*e*) For rules in recent cases on easements by prescription, see *Clippens Oil Co.* v. *Edinburgh District Water Trustees*, (1904) A. C. 64; *Kilgour* v. *Gaddes*, (1904) 1 K. B. 457; *Ruscoe* v. *Grounsell*, (1903) 20 T. L. R. 5, C. A.; *Edinburgh Corporation* v. *N. British Ry.*, (1904) 6 F. 620, Ct. of Sess.

(*f*) *Gaunt* v. *Fynney*, (1872) L. R. 8 Ch. 8.

(*g*) *Murgatroyd* v. *Robinson*, (1857) 7 E. & B. 391.

(*h*) *Bliss* v. *Hall*, *supra*.

(*i*) *Elliotson* v. *Feetham*, *supra*; *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852.

(*k*) *Thomas* v. *Thomas*, (1835) 2 C. M. & R. 34; *Fay* v. *Prentice*, (1845) 1 C. B. 828.

(*l*) *Wright* v. *Williams*, (1836) 1 M. & W. 77; *Crossley* v. *Lightowler*, (1867) L. R. 2 Ch. 478.

proprietors. But by the Rivers Pollution Prevention Act, 1876 (*a*), it is made an offence to discharge any solid matter, or sewage, or any poisonous or noxious liquid from a mine or manufactory, into any stream whether navigable or not, and there is no saving in the Act of existing prescriptive rights to cause such pollution. The Act, however, does not wholly destroy such rights; the only remedies available against a person who at the date of the Act had a prescriptive right to pollute the stream are those provided by the Act, and subject to the restrictions therein contained (*b*). It does not therefore appear intended in any way to affect private rights and duties or to bear on the relation which riparian proprietors in their proprietary character bear to one another.

No right, however, can be acquired by user, however long, to use one's premises in such a manner as to amount to a public nuisance; "none can prescribe to make a common nuisance, for it cannot have a lawful beginning by licence or otherwise, being an offence at common law" (*c*).

Public nuisance defined.

It is in connection with this subject of prescription, as well as with that of the necessity of proving special damage, that the distinction between a public and a private nuisance becomes material. Whether a nuisance belongs to the one class or to the other seems to depend in some cases upon the number of the persons affected by the injurious act, irrespective of the character in which they are so affected; in other cases it seems to depend upon the character in which the persons are injured. A public nuisance has been defined to be "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her Majesty's subjects" (*d*). In the case of *Soltau* v. *De Held* (*e*), it was suggested, however, by Kindersley, V.C., that in order to constitute a public nuisance this further qualification must be added, that the thing complained of must in

(*a*) 39 & 40 Vict. c. 75.

(*b*) ss. 3, 6, on this point see *Midlothian C. C.* v. *Pumpherston Oil Co.*, (1904) 6 F. 387, Ct. of Sess.

(*c*) *Dewell* v. *Sanders*, (1618) Cro. Jac. 490.

(*d*) Criminal Code (Indictable Offences) Bill, 1879, s. 150; and Criminal Code Bill, 1880, s. 146.

(*e*) (1851) 2 Sim. N. S. pp. 142–4.

its nature be an annoyance, in a greater or less degree, "to all persons who come within the sphere of its operation," and from that point of view he doubted whether a nuisance caused by the ringing of bells, however loud and incessant the ringing might be, could ever amount to a public nuisance on the ground that to persons at a distance the sound of the bells, so far from being an annoyance, might be an actual source of pleasure. It will be observed that in the Criminal Code Bills of 1879 and 1880 (*a*) the word "public" is used in two different senses. In the earlier part it means nothing more than a large number of private individuals; thus the "property of the public" there referred to does not mean public property but the property of numerous private persons. In this class of nuisances which affect the injured parties in their private capacity, to constitute the nuisance a public one the number affected must be large. The nuisance must affect the inhabitants of the neighbourhood generally. Whether it does so or not is in each case a question of degree. The reason why the erection of a building which obstructs the rights of a number of different owners cannot be a public nuisance (*b*) is that the owners so injured cannot be sufficiently numerous for this purpose. So, in an old case (*c*), where it was held that the new erecting of a pigeon-house was not a matter inquirable at the court leet, because it was not a common nuisance but only a nuisance to those whose corn the pigeons ate, the decision presumably proceeded upon the assumption that the persons injured would not be many (*d*). On the other hand, in the latter part of the above definition the word "public" is used in its ordinary acceptation, and in the case of the nuisances there dealt with (which seem to be confined to interferences with the right of free passage along a public highway whether by land or water, or with the right of fishing in navigable tidal water) the leading feature is not the number of the persons affected, but the

(*a*) Criminal Code (Indictable Offences) Bill, 1879, s. 150; and Criminal Code Bill, 1880, s. 146.

(*b*) *Per* Kindersley, V.-C., *Soltau* v. *De Held*, (1851) 2 Sim. N. S. p. 144.

(*c*) *Dewell* v. *Sanders*, (1618) Cro. Jac. 490.

(*d*) As that case was decided upon demurrer to a declaration which did not state any special facts which would justify the above assumption, the correctness of the decision may be questioned. A large dove-cot in the immediate neighbourhood of allotment grounds might well be a public nuisance.

character in which they are so affected. Thus if a *cul de sac* leading only to a single house be a public highway, any obstruction to it will be a public nuisance none the less because the owner of the house is the only person who in fact uses the path. But as a nuisance of the former class will be at one and the same time both a private nuisance to the individual proprietors and a public nuisance to the neighbourhood generally, it may be that, if such a nuisance be continued for a period of twenty years, so far as the remedy by action is concerned, the right of the adjoining proprietors to complain of it may be gone, and that they may be left to their remedy by indictment; for, even though such proprietors may suffer a special damage over and above that suffered by the rest of the neighbourhood, they will suffer it as such proprietors, and it may be that by their acquiescence for the prescriptive period they will have conferred upon the party committing the nuisance the right to injure them in their proprietary character. But the point has never been decided.

A weir or mill-dam in a non-navigable river which prevents fish from running up the river is not a public nuisance, for it interferes with no right of the public, but is an injury only to the riparian owners: and such a weir or dam may be prescribed for even by an enjoyment commencing in modern times, for the provisions of Magna Charta and the other early statutes (*a*) prohibiting the erection of weirs apply only to navigable rivers (*b*).

Authorisation of nuisance by statute.

Where a statute has authorised the doing of a particular act, or the user of land in a particular way, which act or user may involve a nuisance, all remedy whether by indictment or by action for injuries resulting therefrom is taken away, providing every reasonable precaution consistent with the exercise of the statutory powers has been taken to prevent the injuries occurring (*c*). Therefore, where a railway company are authorised by their Act to use locomotive engines upon their railway, the owners of land

(*a*) 17 Ric. II. c. 9; 12 Edw. IV. c. 7.

(*b*) *Lord Leconfield* v. *Lord Lonsdale*, (1870) L. R. 5 C. P. 657; *Rolle* v. *Whyte*, (1868) L. R. 3 Q. B. 286.

(*c*) *Rex* v. *Pease*, (1832) 4 B. & Ad. 30. Apparently, however, in order to avoid liability, evidence that every reasonable precaution has been adopted is necessary: *S. E. & Chatham Ry.* v. *London County Council*, (1901) 84 L. T. 632.

adjoining the line whose plantations, crops, or stacks are fired by sparks escaping from the engines cannot recover for such injuries if the company can prove that they took all reasonable measures to prevent the sparks from escaping (*a*). Subsequently to January 1st, 1908, under the provisions of the Railway Fires Act, 1905, railway companies, however, will be responsible, in sums not exceeding one hundred pounds, to the owners of land adjacent to their lines in event of trees, crops, or stacks, being fired by sparks from engines. It has been held that the occupiers of houses adjoining a railway, made under statutory powers, are deprived, in the absence of negligence, of their remedy for the nuisance of vibration caused by the passing trains (*b*), or the nuisance arising from the noise of cattle traffic in a station yard (*c*). The limits of deviation in a railway Act gives the company a discretion as to where they will fix their lines within those limits, and the fact that the nuisance to the plaintiff might have been lessened by fixing the line a few feet farther away does not in any way affect the company's exemption from liability (*d*). And if the company are given a power to purchase additional lands by agreement, after their compulsory powers have expired, in such situations as they may deem most eligible for the purposes of their undertaking, they are not to be bound in the selection of such lands by any consideration, whether one site will be less injurious to neighbouring landowners than another (*e*). But statutory authority to construct and work a tramway, notwithstanding that the keeping of horses is necessarily incidental to the use of a tramway, does not excuse a tramway company for a nuisance arising from noise made by the horses in their stables (*f*). Inasmuch as Canal Acts and Waterworks Acts expressly authorise the storage of large bodies of water, the undertakers under such Acts are not liable for damage caused by

(*a*) *Vaughan* v. *Taff Vale R. Co.*, 1860) 5 H. & N. 679; *Canadian Pacific Ry.* v. *Roy*, (1902) A. C. 220.

(*b*) *Hammersmith R. Co.* v. *Brand*, (1868–9) L. R. 4 H. L. 171.

(*c*) *London, Brighton, &c., R. Co.* v. *Truman*, (1885) 11 App. Cas. 45; see too *Attorney-General* v. *Metropolitan R. Co.*, (1894) 1 Q. B. 384.

(*d*) *Per* Lord Halsbury, (1885) 11 App. Cas. p. 52.

(*e*) *London, Brighton, &c., R. Co.* v. *Truman*, (1885) 11 App. Cas. 45; *National Telephone Co.* v. *Baker*, (1893) 2 Ch. 186.

(*f*) *Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588.

the escape of the water so stored, unless the escape be due to their negligence (*a*). If the intention on the part of the Legislature to authorise the act or user complained of is clear, the right of action for the injuries arising therefrom is taken away none the less because the statute gives no compensation (*b*), although in construing an Act conferring statutory powers a distinction should be drawn between one that is imperative and one that is merely permissive, there being a presumption in the latter case that the express legislative sanction was not intended to conflict with the common law rights of other members of the community (*c*).

Moreover, the statutory authority to commit a nuisance must, in order to afford a defence to the parties committing it, be express or necessarily implied (*d*). Therefore, where a railway Act authorised the construction and maintenance of a railway, but gave no express authority to use locomotive engines upon it, the undertakers were held not to be exempted from liability for damage arising from the escape of sparks from their engines notwithstanding that they took all reasonable precautions to prevent such escape (*e*). Nor do the various Acts authorising horseless traffic on the highways exonerate the owners of locomotives from liability for damage from sparks escaping from them (*f*). So an Act which authorised the formation of district asylums for the care and cure of sick and infirm poor, and made the poor rates liable for the expense, was held not to authorise the building of a small-pox hospital in such a place as to cause a nuisance to the adjoining owners, the intention of the Legislature being, not to take away private rights by authorising the doing of

(*a*) *Whitehouse* v. *Birmingham Canal Co.*, (1858) 27 L. J. Ex. 25; *Dunn* v. *Birmingham Canal Co.*, (1872) L. R. 8 Q. B. 42; *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. 781; *Green* v. *Chelsea Waterworks Co.*, (1894) 10 Times L. R. 259. To the above rule, however, an exception exists in the case of damages to mines. See 10 Vict. c. 17, s. 27.

(*b*) *Hammersmith R. Co.* v. *Brand*, (1868–9) L. R. 4 H. L. 171; *London, Brighton, &c., R. Co.* v. *Truman*, (1885) 11 App. Cas. 45.

(*c*) *Canadian Pacific R. Co.* v. *Parke*, (1899) A. C. 535, P. C.; S. P. *Jordeson* v. *Sutton, &c. Gas Co.*, (1898) 2 Ch. 614.

(*d*) *Ogston* v. *Aberdeen District Tramways Co.*, (1897) A. C. 111.

(*e*) *Jones* v. *Festiniog R. Co.*, (1868) L. R. 3 Q. B. 733.

(*f*) *Powell* v. *Fall*, (1880) 5 Q. B. D. 597. See too the Explosives Act, 1875, 38 Vict. c. 17, compliance with the provisions of which will presumably not take away rights of action for damage caused by an explosion.

that which without the statute would have been actionable, but merely to charge on the rates the expense of maintaining hospitals under circumstances under which they might lawfully have been maintained at common law (*a*). So, too, an Act which imposes an obligation on a local authority to repair the highways does not thereby authorise them to use for that purpose steam-rollers of such a weight as to crush gas or other pipes lawfully laid under the roadway (*b*). And *à fortiori* this rule applies where damage results from an excessive use of a highway by a person acting without statutory authority (*c*). But, on the other hand, there is no duty laid upon a local authority, when effecting a permanent reduction in the level of a highway, to relay existing water pipes thereunder, so as to maintain their former relative distance beneath the surface, (*d*). In *Sadler* v. *South Staffordshire, &c., Tramways Co.* (*e*) the defendants, a company with statutory powers, had running powers over the line of another company likewise made under statutory powers. Through a defect in this line a car of the defendant company left the rail and injured the plaintiff. It was held that the defendants were responsible to the public for running their cars over a line which had been negligently permitted to be in an unsafe condition (*f*).

However, in *Hawley* v. *Steele* (*g*), Jessel, M.R., was strongly of opinion that an Act of Parliament, which provided that all lands, which should thereafter be taken for the use of the Ordnance Department and for the defence of the realm, should vest in certain officers in trust for her Majesty and for the service of the said department, impliedly authorised such officers to use any land which they might so acquire for any reasonable military purpose, and that, however great a nuisance the use of the land

(*a*) *Metropolitan Asylum District* v. *Hill*, (1881) 6 App. Cas. 193; but see *Attorney-General* v. *Nottingham Corporation*, (1904) 1 Ch. 673; *Attorney-General* v. *Rathmines & Pembroke Hospital Board*, (1904) 1 Ir. R. 161, C. A.

(*b*) *Gas Light & Coke Co.* v. *St. Mary Abbott*, (1885) 15 Q. B. D. 1. For liability for personal damages under such circumstances, see *Driscoll* v. *Poplar Board of Works*, (1898) 62 J. P. 40.

(*c*) *The Mayor, &c. of Chichester* v. *Foster*, (1905) 22 T. L. R. 18.

(*d*) *Southwark & Vauxhall Water Co.* v. *Wandsworth District Board of Works*, (1898) 2 Ch. 603.

(*e*) (1889) 23 Q. B. D. 17.

(*f*) *Ogston* v. *Aberdeen District Tramways Co.*, (1897) A. C. 111.

(*g*) (1877) 6 Ch. D. 521.

for such purposes might cause to the owners of the adjoining land, the latter were wholly without remedy.

It has, however, been held in the recent case of *Blundell* v. *The King* (*a*), that upon a compulsory sale of land to the Crown, the owner is entitled to compensation for loss of amenity in respect of adjacent property.

Negligent use of statutory powers.

But even in cases in which the nuisance complained of is *primâ facie* authorised by statute, the party causing it will be liable if he does not take reasonable precautions to prevent damage resulting therefrom (*b*). Though exempt from the absolute liability which would attach to a person not acting under statutory powers, he still is liable if he exercise his powers negligently. Therefore where a local board were authorised by statute to construct and place a landing-stage in a navigable river, and, for the purpose of keeping such stage in position, to place anchors out in the river which had the effect of obstructing to some extent the navigation, they were nevertheless held liable for injuries caused to a vessel by reason of its having come into collision with one of the anchors, they not having by means of proper buoys sufficiently indicated the position of the anchor to persons navigating the river (*c*). A water company, though in maintaining their works they may be acting under statutory powers, are bound to take reasonable precautions to provide against the consequences of an ordinary frost (*d*). But the omission to take precautions against the possible consequences of an extraordinary frost is not negligence. Therefore where the plaintiff's premises were flooded by water escaping from a water company's main, by reason of a frost of an unprecedented severity having penetrated to an unusual depth in the soil and there frozen the water in a pipe, whereby a fire-plug was forced out of its position, the company were held not liable (*e*). So, too, a gas company are bound to maintain a reasonable inspection of their mains and pipes so as to enable them to detect any

(*a*) (1905) 92 L. T. 53.

(*b*) *Vaughan* v. *Taff Vale R. Co.*, (1860) 5 H. & N. 679; and see *Ogston* v. *Aberdeen District Tramways Co.*, (1897) A. C. 111.

(*c*) *Joliffe* v. *Wallasey Local Board*, (1873) L. R. 9 C. P. 62.

(*d*) *Stegglen* v. *New River Co.*, (1865) 13 W. R. 413.

(*e*) *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. 781.

leakage of gas which may occur through fracture or imperfection in the pipes, and to repair any defective pipe with all speed; and if owing to a neglect to keep up such a reasonable inspection an explosion occurs, they will be responsible for any loss occasioned thereby (*a*). So, too, a railway company are bound from time to time to inspect their bridges and see that the brickwork is in good order and all the bricks well secured; and if owing to neglect to make such inspection a bridge is allowed to get out of repair and a brick falls from it on to a passer-by and injures him, they will be liable, although the bridge may have been erected under statutory powers (*b*). So where a railway company make an embankment under their Act they are bound to provide proper flood openings to prevent injury to adjoining lands from flood water being penned back (*c*). It is, moreover, obligatory on them strictly to conform to the terms of the Act of Parliament from which they derive their powers; and in default an action lies against them, without proof of injury to the public (*d*). A water or gas company who are empowered to take up the pavement of a street for the purpose of laying down pipes are bound to exercise care to prevent injury arising therefrom to passers-by (*e*). Persons who, while acting in the exercise of their statutory-powers, are guilty of negligence, are liable for damage resulting from such negligence none the less because they do not derive any personal benefit from the exercise of their powers (*f*).

Who may sue for a nuisance—Assignee of land affected.

Where a person creates upon his premises a permanent source of nuisance to the adjoining land, as where he builds a house so as to obstruct ancient lights, or with overhanging eaves which cause the rainwater to drip on to his neighbour's house, or where he stops a river so that the adjoining land is flooded, the assignee of the premises which are damaged by the nuisance, whether he be lessee for a term of years (*g*), or purchaser in

(*a*) *Mose* v. *St. Leonards Gas Co.*, (1864) 4 F. & F. 324.

(*b*) *Kearney* v. *London, Brighton, &c., R. Co.*, (1871) L. R. 6 Q. B. 759.

(*c*) *Lawrence* v. *Great Northern R. Co.*, (1851) 16 Q. B. 643.

(*d*) *Attorney-General* v. *L. & N. W. R. Co.*, (1900) 1 Q. B. 78, C. A.

(*e*) *Drew* v. *New River Co.*, (1834) 6 C. & P. 754; *Holliday* v. *National Telephone Co.*, (1899) 2 Q. B. 392.

(*f*) *Mersey Dock Trustees* v. *Gibbs*, (1864–5) L. R. 1 H. L. 93; *Hill* v. *Tottenham Urban District Council*, (1898) 79 L. T. 495; *Shoreditch Corporation* v. *Bull*, (1904) 90 L. T. 210, H. L.

(*g*) Rolle Ab. Nuisance, K. 2.

fee (*a*), or devisee (*b*), may sue in respect of a continuance of the nuisance, notwithstanding that the original creation thereof was before he had any interest in the soil (*c*).

Action by Attorney-General in case of public nuisance.

In the case of a public nuisance such as a trespass on the highway by building out beyond the adjacent, or admitted, building line, or generally for the breach of any public statutory duty, a right of action vests in the Attorney-General, to restrain the prospective breach, or to abate the nuisance, if persisted in, by mandatory injunction.

This action is generally initiated at the relation of the Local Authority who in cases of importance should put the Attorney-General in motion to exercise the authority vested in him for the protection of the public (*d*).

Apparently, however, minor infringements of public rights hardly justify the intervention of the Attorney-General, it being stated by the Lord Chancellor (Halsbury) in *The London County Council* v. *The Attorney-General*, that (*e*) "It may well be . . . that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of Law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not."

Reversioner.

A reversioner may sue for any wrongful act of a permanent nature which would tend either to destroy the evidence of the fact that the adjoining land was burdened with a servitude in his favour, or to establish evidence against him that his land was burdened with a corresponding servitude in favour of the adjoining land (*f*). It is not enough that the act would, if continued,

(*a*) *Penruddock's case*, (1597) 5 Rep. 100 b.

(*b*) *Some* v. *Barwish*, (1609) Cro. Jac. 231.

(*c*) And see *per* Parke, B., *Thompson* v. *Gibson*, (1841) 7 M. & W. p. 461.

(*d*) *Attorney-General* v. *Wimbledon House Estate Co., Ltd.*, (1904) 2 Ch. 34.

(*e*) (1902) A. C. 165, at p. 168.

(*f*) As to when reversioner may sue for a trespass, see above, p. 354.

be evidence against the reversioner on a claim of right, but it must also be of such a permanent nature as necessarily to lead to the presumption that it will be so continued (*a*). Any act will be of a sufficiently permanent nature within the meaning of this rule if its effects will in the ordinary course of things continue unless some further positive act be done to prevent their continuance. Thus it has been held that a reversioner is entitled to sue for the wrongful erection of a hoarding or other obstruction against his ancient light though it was possible that the obstruction might be removed before his estate fell into possession (*b*). It was, however, decided in *Cooper* v. *Crabtree* (*c*), that the erection of a hoarding, not being a structure of such a permanent character as to injure the reversion, could not be restrained by injunction. But a declaration by a reversioner that the defendant had locked a gate across a way to which the plaintiff was entitled for his tenants, and that thereby the plaintiff was injured in his reversionary estate, has been held sufficient (*d*). So, too, where the plaintiff was entitled for his tenants to a right of access to his wharf and siding from the railway of the defendants, and the defendants, with the intention of preventing such access, left large quantities of rolling stock lying continually across the mouth of the siding, the obstruction thereby caused was considered sufficiently permanent to enable the plaintiff to sue for an injury to his reversionary interest (*e*), on the ground that the carriages could not roll themselves away (*f*). So, too, where the adjoining owner builds a house with projecting eaves whereby the rainwater from the house is discharged upon the plaintiff's soil, the plaintiff may sue as for an injury to his reversion by reason that the enjoyment of the eavesdropping would furnish some evidence against him of a right to its continuance (*g*).

In *Simpson* v. *Savage* (*h*) a nuisance caused by the erection of

(*a*) See *per* Maule, J., *Kidgill* v. *Moor*, (1850) 9 C. B. p. 372.

(*b*) *Shadwell* v. *Hutchinson*, (1831) M. & M. 350; *Metropolitan Association* v. *Petch*, (1858) 5 C. B. N. S. 504.

(*c*) (1882) 20 Ch. D. 589, C. A.

(*d*) *Kidgill* v. *Moor*, (1850) 9 C. B. 364.

(*e*) *Bell* v. *Midland R. Co.*, (1861) 10 C. B. N. S. 287.

(*f*) *Per* Willes, J., *ibid.* p. 302.

(*g*) *Tucker* v. *Newman*, (1839) 11 A. & E. 40.

(*h*) (1856) 1 C. B. N. S. 347; and see *Mumford* v. *Oxford, Worcester, &c. R. Co.*, (1856) 1 H. & N. 34.

workshops and a forge, which produced noise and smoke, was held to give no cause of action to the reversioner of the adjoining premises, for though the erection of the forge and workshops was necessarily of a permanent character, the mode of user, in which the nuisance consisted, was not, and the Court assumed that the premises might have been used in such a way as not to produce a nuisance (*a*). But where the defendant builds a large factory and fills it with noisy machinery which can only be used in such a way as to cause a nuisance to the neighbouring property, the Court will hold the nuisance to be sufficiently permanent to satisfy the rule (*b*). Indeed, the object of the rule itself as to permanence is not very obvious; it is not easy to see why, if the probability of the defendant continuing the state of things which will furnish evidence against the reversioner can be established by other means, as for instance by a declaration of intention to continue it, that should not of itself entitle the reversioner to sue. Not to allow him so to do might cause great hardship, for evidence which might be easily met at the outset may become very difficult to rebut after a long term of years; and especially would this hardship exist where the repetition of the acts complained of would not merely furnish evidence against the owner of the future estate, but would under the provisions of the Prescription Act create an absolute title against him, as for instance where a way is enjoyed for forty years while the servient tenement is in the possession of a tenant for life. In such case after the expiry of the forty years the remainderman would be bound (*c*), a result which would be eminently unjust unless he were allowed to protect himself during the period by bringing an action before his estate fell into possession.

Whether a reversioner can bring an action to prevent his land being burdened in favour of the defendant's with a negative easement such as that of light has never been expressly decided. Since the passing of the Prescription Act, 1832, the opening of new windows, if the enjoyment be uninterrupted for the statutory period, confers an absolute right to the light, and operates to

(*a*) But see *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707.

(*b*) *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287, 317.

(*c*) *Symons* v. *Leaker*, (1885) 15 Q. B. D. 629.

restrict the adjoining owner's power of using his land for building purposes. But it would be very unjust that a reversioner of the adjoining land, who was unable to obtain the termor's consent to a physical obstruction of the defendant's window-lights, should be powerless to prevent the accrual of a right which might turn out to be most injurious to his property. In many cases, indeed, there are *dicta* to be found to the effect that the opening of new windows is in law an innocent act (*a*), but in all of them apparently the judges were contemplating an enjoyment had while the owner of the fee of the servient tenement was in possession, and consequently had the power, if he chose to exercise it, of physically obstructing the light, and must not be taken to have had in view the hardship which might result from refusing a right of action to a reversioner, However, the fact that no such action has ever yet been brought is too strong an argument against the existence of the right of action to be got over, and it must be assumed that, notwithstanding the objection on the ground of hardship, the opening of new windows is not a ground of action even at the suit of a reversioner.

Local authority blocking lights.

In the recent case of *The Mayor and Corporation of Paddington* v. *The Attorney General* (*b*), it was held by the House of Lords that a local authority in whom a disused burial ground was vested as an open space for the use of the public were empowered to erect a hoarding upon such open space for the purpose of preventing an adjoining landowner from acquiring a right to the access of light over it.

Who are liable to be sued for a nuisance.

In dealing with the question of the parties who are liable for a nuisance existing upon private property a distinction is to be drawn in the first place between those cases in which the damage is caused by the physical condition of the premises themselves and those in which it is caused by the particular mode of their user; and, secondly, with regard to the former class of cases a further distinction is to be drawn between those cases in which the physical condition complained of is the result of a wrongful act of commission and those in which it is due to a wrong of omission.

(*a*) *Tapling* v. *Jones*, (1865) 11 H. L. C. 290; *per* Bayley, J., *Cross* v. *Lewis*, (1824) 2 B. & C. p. 689; *per* Lord Selborne, *Angus* v. *Dalton*, (1881) 6 App. Cas. p. 797.

(*b*) (1905) 22 T. L. R. 55, H. L.

Nuisance caused by physical condition of premises resulting from act of commission

1. Where the nuisance complained of is caused by the physical condition of the premises and that condition is the result of an act of commission, as for instance where a building is erected so as to obstruct the plaintiff's ancient lights (*a*) or market (*b*), the party who originally created the nuisance remains liable for all the damage flowing from its continuance, even though by reason of his not being in possession of the premises he is unable to prevent that continuance. "If a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it" (*c*).

Thus if the builder of a house which causes an obstruction of the kinds above mentioned lease it to a tenant (*d*) or sell it to a purchaser in fee (*e*), an action will lie from time to time against the builder for continuing the obstruction notwithstanding the lease or sale. Whether in the case of a lease the lessee would also be liable is not quite clear, but presumably he would. In *Ryppon* v. *Bowles* (*f*) Lord Coke inclined to the view that he would not, on the ground that it would be waste in him to alter the structure, but the rest of the Court seem to have doubted, and no judgment was given on the point. In the latter case of *Roswell* v. *Prior*, Lord Holt denied Lord Coke's view to be law, and maintained that, whether it were waste in the lessee to abate the nuisance or not, he would be liable for its continuance, for it was his "fault to contract for an interest in land on which there was a nuisance" (*g*). In the case of a sale it is clear that, after notice to abate, the purchaser would be liable as well as the vendor (*h*).

And not only does the erector of a nuisance of the above character remain liable for its continuance where it was originally erected for his benefit upon his own land, but the same principle applies to a contractor who is employed to erect it on the land of third persons (*i*).

(*a*) *Roswell* v. *Prior*, (1701) 12 Mod. 635.

(*b*) *Thompson* v. *Gibson*, (1841) 7 M. & W. 456; and see *Wilcox* v. *Steel*, (1904) 1 Ch. 212.

(*c*) *Per Cur.*, *Roswell* v. *Prior*, (1701) 12 Mod. p. 639.

(*d*) *Roswell* v. *Prior*, *supra*.

(*e*) *Ibid.* p. 639.

(*f*) (1615) Cro. Jac. 373.

(*g*) (1701) 12 Mod. p. 640.

(*h*) *Penruddock's case*, (1597) 5 Rep. 100 b.

(*i*) *Thompson* v. *Gibson*, (1841) 7 M. & W. 456.

The purchaser of land with an existing nuisance upon it cannot be sued for continuing the nuisance until after a request made to abate it (*a*).

Nuisance caused by physical condition of premises resulting from wrong of omission.

2. Where the physical condition of the premises complained of is the result of a wrong of omission, as where the owner of a house suffers it while in his possession to get into a ruinous state so that portions of it are likely to fall upon the adjoining land and do damage (*b*), or where the owner of a coal-plate (*c*) or grating (*d*) in the footway of a public street permits it while in his possession to be in such an insecure condition as to be dangerous to persons using the street, such owner cannot rid himself of liability for the possible consequences of his breach of duty by merely letting the premises to tenants without taking a covenant from the tenants to repair them. If he lets them without such a covenant, both landlord and tenant are liable for any damage arising from the condition of disrepair existing at the date of the lease. And the liability of the lessor in such a case is independent of the question whether at the time of the lease he had or had not any actual knowledge of the state of disrepair (*e*). Apparently, however, if the defective grating, or other article of a cognate character, was immovably fixed in position contemporaneously with the dedication of the street, it forms such an integral part of the highway as to shift the burden of responsibility from the owner or occupier of the premises on to the local authority (*f*).

It has been said that if while premises are on lease a party buys the reversion he is liable for any nuisance existing upon the premises for which the original reversioner would have been liable, although he has no opportunity of putting an end to the tenant's interest or abating the nuisance (*g*); but the correctness of this proposition may well be doubted, for the mere receipt of

(*a*) *Penruddock's case*, *supra*, 417.

(*b*) *Todd* v. *Flight*, (1860) 9 C. B. N. S. 377; *Chauntler* v. *Robinson*, (1849) 4 Ex. 163.

(*c*) *Pretty* v. *Bickmore*, (1873) L. R. 8 C. P. 401.

(*d*) *Gwinnell* v. *Eamer*, (1875) L. R. 10 C. P. 658.

(*e*) See *per* Erle, C.J., *Gandy* v. *Jubber*, (1864) 5 B. & S. p. 492, where he so states the rule without any qualification.

(*f*) *Robbins* v. *Jones*, (1863) 15 C. B. N. S. 221.

(*g*) *Per* Littledale, J., *Rex* v. *Pedly*, (1834) 1 A. & E. p. 827. He cites no authority for the proposition.

rent does not amount to a continuance of the nuisance (*a*). It is, however, the common law duty of an owner of property in possession absolutely to prevent it from becoming a public nuisance; consequently the fact that he has exercised, though ineffectually, all reasonable diligence in abating the nuisance will not protect him from liability (*b*).

Covenant to repair.

On the other hand, if premises are leased for a term of years which were in a sufficient state of repair at the time of the lease, and are subsequently suffered to get out of repair during the lease, for any damage arising therefrom to third persons, in the absence of a covenant by the lessor to repair, the lessee alone is liable (*c*).

Where premises are let to a tenant from year to year, the fact that they are allowed by the tenant to get out of repair does not apparently impose on the landlord the obligation of determining the tenancy by notice to quit, and omission to give such notice does not amount to a reletting so as to render him liable for continuance of a nuisance arising from the disrepair (*d*), though at one time it was thought otherwise (*e*). And the same rule applies to the case of a tenancy from week to week (*f*).

Where disrepair amounts to nuisance.

Where premises while in the occupation of a tenant are in such a state of disrepair as to cause a nuisance, then, whether that state of disrepair existed at the time of the letting or only arose during the tenancy, if either landlord or tenant covenanted with the other to repair, the party so covenanting alone is liable. If the lessor has covenanted with the tenant to repair, he and not the tenant is liable for any injury sustained by a stranger during the lease from the premises having got out of repair (*g*). But in the absence of an express covenant, a landlord is not liable to his tenant for personal expenses caused by the defective condition of

(*a*) *Gandy* v. *Jubber*, (1864–5) 9 B. & S. 15.

(*b*) *Attorney-General* v. *Tod Heatley*, (1897) 1 Ch. 560, C. A.

(*c*) *Cheetham* v. *Hampson*, (1791) 4 T. R. 318; *Russell* v. *Shenton*, (1842) 3 Q. B. 449.

(*d*) See the undelivered judgment of the Exch. Ch. in *Gandy* v. *Jubber*. (1864–5) 9 B. & S. 15.

(*e*) See *per* Littledale, J., *Rex* v. *Pedly*, (1834) 1 A. & E. p. 827; and *Gandy* v. *Jubber*, in the Q. B., (1864) 5 B. & S. 78.

(*f*) *Bowen* v. *Anderson*, (1894) 1 Q. B 164, disapproving *Sandford* v. *Clarke*, (1888) 21 Q. B. D. 398, *contra*.

(*g*) *Payne* v. *Rogers*, (1794) 2 H. Bl. 350. See too *Rich* v. *Basterfield*, (1847) 4 C. B. 783; and *per* Lopes, J., *Nelson* v. *Liverpool Brewery Co.*, (1877) 2 C. P. D. p. 313.

the demised premises (*a*). And a covenant by the tenant to do all, except certain specified repairs, does not impose any liability upon the landlord during the lease to do the excepted repairs; therefore, where an owner let a house in good repair at the time of the letting, the tenant covenanting to do all necessary repairs to the premises except main walls, roof, and main timbers, and the owner made no agreement to repair the excepted portions, and by reason of a part of the main walls being out of repair a chimney fell down and injured the plaintiff, it was held that the owner was not liable (*b*); the lessee in such case, though under no obligation as towards his landlord to do the repairs, being as towards third persons responsible for the non-repair.

On the other hand, a covenant by the lessee to repair will apparently exonerate the lessor from the consequences of a nuisance arising from the disrepair of the premises at the date of the lease, even though at such date the lessor had full knowledge of the disrepair (*c*).

This rule, that a private agreement between landlord and tenant as to the repairs can determine the question as to which of them is responsible to third parties for a nuisance arising from disrepair, a rule which must be regarded as somewhat anomalous, is said to be founded upon the desirability of avoiding circuity of action (*d*).

Sale of premises in state of disrepair.

Whether an owner who sells to a purchaser premises which by his neglect he has permitted to be in a dangerous condition can by such sale get rid of his liability for future damage arising from that condition, whether, that is to say, such sale will operate in the same way as the taking of a covenant from the tenant in the case of a lease, there is no authority to show; but it is presumed that it will do so, and that upon the sale, without more, the liability will be transferred to the purchaser (*e*). And if this be so, then a person who excavates his land for mining or other purposes, and then sells it in that condition, will by the fact of sale discharge himself from liability to the owners of the

(*a*) *Tredway* v. *Machin*, (1904) 91 L. T. 310.

(*b*) *Nelson* v. *Liverpool Brewery Co.*, (1877) 2 C. P. D. p. 311.

(*c*) *Per* Brett, J., *Gwinnell* v. *Eamer*, (1875) L. R. 10 C. P. p. 661.

(*d*) *Payne* v. *Rogers*, (1794) 2 H. Bl. p. 351.

(*e*) And see *Attorney-General* v. *Tod Heatley*, where the defendant's responsibility was transferred to the succeeding owner, (1897) 1 Ch. 560.

adjoining land for any subsidences occurring subsequently to the date of the sale, the excavation itself not being a wrongful act so as to bring the case within the rule of *Roswell* v. *Prior* (*a*), and the only breach of duty committed by the vendor being a wrong of omission in neglecting to substitute artificial support in lieu of that taken away. It is also apprehended that a similar transfer of liability would take place in the case of a devolution upon heir (*b*) or devisee. The general proposition, as stated above, must, however, be taken with some reservation, it having been held in the modern case of *Hall* v. *Duke of Norfolk* (*c*) that an owner in possession is not responsible for a subsidence of land primarily caused by the acts of his predecessor in title; and further that, under such circumstances, an original owner by parting with the property does not thereby divest himself of responsibility for the damage occasioned by such subsidence. Nor can the Statute of Limitations be pleaded in such cases, the right of action accruing from the date of the subsidence, and not from the date of the act by which such subsidence was originally caused (*d*).

Nuisance caused by mode of user of premises.

3. Where the nuisance arises, not from the physical condition of the premises themselves, but from the mode of their user, then if the premises are, at the time of the nuisance arising, in the occupation of a tenant, the better opinion seems to be that the tenant is liable and the landlord is not, even though the latter may have contemplated the premises being used in the very way which brings about the state of things complained of. The case of *Rex* v. *Pedly* (*e*) no doubt gives countenance to the opposite view. There the indictment charged that the defendant erected certain privies and a sink near a highway, and caused persons to resort to and use them, and thereby create such a stench as amounted to a nuisance. On proof that the defendant was landlord of certain houses which together with the privies and sink were let to tenants who used them in the manner stated,

(*a*) (1701) 12 Mod. 635.

(*b*) Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 App. Cas. p. 144, thought otherwise, but he dissented from the judgment of the majority.

(*c*) (1900) 2 Ch. 493; and see *Greenwell* v. *Low Beechburn Coal Co.*, (1897) 2 Q. B. 165.

(*d*) As to the method of assessing damages in such cases, see *Tunnicliffe and Hampson* v. *West Leigh Colliery Co.*, (1905) 74 L. J. Ch. 649.

(*e*) (1834) 1 A. & E. 822.

he was held liable, although neither privies nor sink were a nuisance apart from their user by the tenants. But the grounds of the decision are not very clear; and in the later case of *Rich* v. *Basterfield* (*a*), the Court observed that if *Rex* v. *Pedly* "is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it." In this last case an action was held not to lie against the landlord of a house under lease to a tenant for a nuisance caused by the chimneys smoking to the annoyance of the adjoining occupier, on the ground that the chimneys *per se* were not a nuisance, and the lighting the fires which was purely optional on the part of the tenant was in no sense the act of the landlord. The Court laid it down that "if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant" (*b*). No doubt it is in one sense optional with the tenant whether he uses the privies or fireplaces, but practically it is not. The Court, however, declined to recognise any distinction on that score. "To bring liability home to the owner the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant" (*c*).

Occupier liable for nuisance committed on his premises with his permission.

Where a person permits third parties to commit a nuisance upon premises of which he himself is in occupation at the time of the nuisance committed, the occupier permitting such acts of

(*a*) (1847) 4 C. B. 783.

(*b*) But see the case of *Harris* v. *James*, (1876) 45 L. J. Q. B. 545, where the lessor of a lime-kiln was held liable for a nuisance caused by the smoke of the kiln, on the ground that such nuisance was a necessary consequence of the use of the kiln in the mode contemplated by the demise. The case of *Rich* v. *Basterfield* was there criticised and spoken of as a case "of excessive refinement."

(*c*) *Per* Crompton, J., *Gandy* v. *Jubber*, (1864) 5 B. & S. p. 87; but see *Sanders-Clark* v. *Grosvenor Mansions Co. and D'Allessandri*, (1900) 2 Ch. 373.

nuisance is responsible therefor, notwithstanding that they be not done on his behalf or for his benefit (*a*). But mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it (*b*).

(*a*) *Per Cur.*, *Rich* v. *Basterfield*, (1847) 4 C. B. p. 804; and see *White* v. *Jameson*, (1874) L. R. 18 Eq. 303.

(*b*) *Saxby* v. *Manchester & Sheffield R. Co.*, (1869) L. R. 4 C. P. 198.

CHAPTER XV.

DUTIES ATTACHING TO THE USE OF PROPERTY.

NEGLIGENCE.

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ALL kinds of material property, whether land or chattels, are capable of being so used as to become instruments of mischief. But it is not in every case of user of property that any duty attaches to the party using it to prevent mischief arising. In the case of certain classes of property the owner may, subject to certain limitations, use it in the manner most beneficial to himself without regard to the injury which such user may inflict on his neighbours. Again in those cases in which there is a duty to prevent injury arising from the mode of user the extent of the duty is not always the same. In some it is an absolute duty to prevent damage ensuing, in others it is a limited duty to take care. Of injurious acts of user of property there are therefore three classes: those acts which may be done with absolute impunity; those acts lawful in themselves which the doer does at his peril, and liability for which is independent of any question of negligence; and thirdly, those acts which (in the absence of wilfulness) create liability only if done negligently.

Acts which may be done with impunity.

1. The class of cases in which injurious acts of user of property may be done with impunity is very limited; it includes no cases of user of chattels, and is restricted to those modes of user of land which are generally described by the expression "natural." "The cases have decided that where the maxim *sic utere tuo ut alienum non lædas* is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner he cannot succeed" (*a*). This term "natural use of land" as descriptive of the kind of user which will beget no responsibility is employed in a somewhat artificial and restricted sense. There are many modes of user of land which are natural, in the sense that they are customary in relation to the particular class of land to which they are applied, which if productive of damage to adjoining land cannot be justified. For instance, it is natural, in the ordinary sense of the term, to put manure upon land used for agricultural purposes, but if the manure soak through the soil and percolate away into the plaintiff's well, the defendant will be liable. Again, the erecting of a privy is a natural use of house property in the ordinary sense of the term, yet nevertheless the owner will erect it at his peril, and if the filth escape from it, he will be liable to his neighbour for any damage resulting from such escape. The expression "natural user" itself was first employed by Lord Cairns in *Fletcher* v. *Rylands* (*b*), and has since been adopted by various judges (*c*) as a convenient expression by which to designate those acts of user which may be done with impunity, but there has not as yet been given from the bench any definition of the expression, nor any exhaustive enumeration of the kinds of user which it would include.

(*a*) *Per* Brett, L.J., *West Cumberland Iron & Steel Co.* v. *Kenyon*, (1879) 11 Ch. D. p. 787.

(*b*) (1866–8) L. R. 3 H. L. p. 338.

(*c*) *Per* Fry, J., *Attorney-General* v. *Tomline*, (1879) 12 Ch. D. p. 230; *per* Cotton, L.J., *Hurdman* v. *North Eastern R. Co.*, (1878) 3 C. P. D. p. 174; *per* Brett, L.J., *West Cumberland Iron & Steel Co.* v. *Kenyon*, *supra*; *per* Brett, M.R., *Whalley* v. *Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. p. 141.

Foremost, however, among the kinds of user included under it comes the working of minerals according to the recognised course of mining.

Damage by mine water flowing down by natural gravitation.

It is now well-settled law that "the owner of minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals" (*a*), and (subject to an exception in the case of subsidence arising from the withdrawal of support (*b*)) for any injury caused to the land of the adjoining owner by the removal of such minerals if the removal be conducted in the ordinary way the party injured will be without redress. Thus where the plaintiff and defendant were owners of two adjoining mines, and in the upper part of the defendant's mine, which was on the rise, there was collected a large subterranean body of water supported by a thick horizontal bar of coal, and the defendant worked this bar of coal, whereby the body of water flowed down and flooded the plaintiff's mine, the defendant was held to be free from liability, notwithstanding that at the time of working the coal he knew that the effect of his so doing would be to cause the damage which occurred (*c*). The proportion, which the benefit to be gained by the defendant bears to the injury to be inflicted on the plaintiff, is not a material element for consideration, and a mine owner proposing to remove certain minerals in his mine may do so with impunity none the less because the minerals when got will be but of trifling value, and the injury caused to his neighbour by their removal incalculable. The exemption from liability for damage resulting from the causing of water to flow down in the course of mining operations is not confined to the case of mere drainage percolating through the soil, but extends to the release of water already collected in a defined basin (*d*). But whether that exemption extends to the case of tapping a running stream seems doubtful. It has been held that a mine owner who in the course of mining taps a stream and thereby diminishes the flow of water in such stream is responsible therefor to a lower riparian owner (*e*), but the question whether he is also liable to

Damage caused by tapping stream in course of mining.

(*a*) *Per* Lord Blackburn, *Wilson* v *Waddell*, (1876) 2 App. Cas. p. 99.

(*b*) See below, p. 429.

(*c*) *Smith* v. *Kenrick*, (1849) 7 C. B. 515.

(*d*) *Smith* v. *Kenrick*, *supra*.

(*e*) *Grand Junction Canal Co.* v. *Shugar*, (1871) L. R. 6 Ch. 483.

the adjoining owner whose mine or land he floods must be regarded as an open one, though there seems to be no reason in principle why he should be. The head-note to the case of *Crompton* v. *Lea* (*a*) suggests indeed that he would be liable, but a reference to the judgment will show that the decision in that case did not proceed upon any distinction between a running stream and a stationary pool. There the bill averred that the defendants threatened to work certain seams in a mine which it was impossible further to work for any mining purpose, and that the effect of working them would be to let in a river and flood the defendant's mine and through it the plaintiff's mine, and prayed an injunction. A demurrer to the bill was overruled by Hall, V.-C., apparently on the ground that the act which the defendants proposed to do was not for any legitimate mining purpose. Lord Blackburn in *Wilson* v. *Waddell* (*b*) refers to the point, but does not decide it.

Interference with natural gravitation of mine water.

But though a mine owner is not answerable for water flowing down by natural gravitation into his neighbour's mine, he must not, as a general rule, purposely interfere with the gravitation of the water so as to make it more injurious to the lower mine, or more advantageous to himself. Thus where the defendants, having in their mines two seams, A. and B., made a crut between them inclining downwards in the direction of seam B. as a means to the more convenient conveyance of the minerals in seam A. to the surface, and in order to enable them to work the minerals in the lower part of seam A., pumped water therefrom up to the level of the crut, which water flowed down the crut into seam B. and thence into the plaintiff's mine and did damage, it was held that the defendants were liable (*c*). In the same case it was also held that for water flowing down by natural gravitation from the upper part of seam A. into the crut, and so into the plaintiff's mine, the defendants were not liable. At the same time, however, the Court intimated that if the crut had been made for the purpose of turning water into the plaintiff's mine, which would not otherwise have arrived there, and not for the purpose of the conveyance of minerals from one seam to another, the action would have lain (*d*).

(*a*) (1874) L. R. 19 Eq. 115.
(*b*) (1876) 2 App. Cas. p. 98.
(*c*) *Baird* v. *Williamson*, (1863) 15 C. B. N. S. 376.
(*d*) *Baird* v. *Williamson*, *supra*, at p. 391.

And in *Westminster Brymbo Coal and Coke Co.* v. *Clayton* (*a*), where the barrier between the plaintiffs' and the defendant's mines having been perforated, the defendant constructed an artificial trough leading from his mines to the perforations, for the purpose of carrying off water raised by pumping from below and also the drainage from the upper *strata*, Wood, V.-C., granted an injunction to restrain the defendant from so using the trough, drawing no distinction between the two classes of water. But where the defendants worked two adjoining mines, A. and B., and the water from A. had been accustomed to flow through a certain artificial opening into B., and the defendants, to save the expense of pumping in B., stopped up the opening, thereby causing the water thus penned back to rise in A. so high as to flow through certain other openings made by the plaintiffs' predecessors into the plaintiffs' mine, it was held that the plaintiffs were not entitled to relief, on the ground that the stopping up of the opening between A. and B. had the same effect as though the opening had never been made (*b*). Another mode of interfering with the natural gravitation of mine water similar to that of making a trough to guide its course is that of boring a hole to get rid of the water, and the making of such bore-hole, though it may not amount to a trespass, will not be permitted if its effect will be to cause the water to enter the plaintiff's land to a greater extent than it did before (*c*).

Agricultural operations.

The same immunity which attaches to the removal of minerals underground, attaches also to the digging and removing of portions of the soil on the surface (*d*), such as gravel, brick-clay, &c. It also, apparently, attaches to certain agricultural operations. "If a man be so situated with regard to his neighbour that by an ordinary act in the use of his neighbour's land, such as by deep ploughing, the ordinary flow of water is sent from that land on to his land, he would be in the position of having his land subject to that defect, and, therefore, could not recover for the injury he might suffer" (*e*). So where a farmer by ploughing up forest

(*a*) (1867) 36 L. J. Ch. 476.

(*b*) *Lomax* v. *Stott*, (1870) 39 L. J. Ch. 834.

(*c*) *West Cumberland Iron & Steel Co.* v. *Kenyon*, (1879) 11 Ch. D. 782; and cp. *Whalley* v. *Lancashire & Yorkshire R. Co.*, (1884) 13 Q. B. D. 131.

(*d*) See *per* Fry, J., *Attorney-General* v. *Tomline*, (1879) 12 Ch. D. p. 230.

(*e*) *Per* Brett, M.R., *Whalley* v. *Lancashire & Yorkshire R. Co.* at p. 141, *supra*. But these agricultural opera-

land and bringing it into cultivation caused thistles to grow where none grew before, and the thistle seeds were blown by the wind on to his neighbour's land and did damage, it was held that no action lay. He was under no obligation to cut the thistles periodically to prevent the escape of the seeds (*a*). This decision must be regarded as turning upon the fact that the operation which caused the thistles to spring up was a natural use of the soil. If it had been a non-natural use, then, although he did not intentionally bring the thistles on to his land, but they grew there spontaneously as the result of his having broken up the surface, he would have been liable on the principle of *Hurdman* v. *North Eastern R. Co.* (*b*).

There are, indeed, *dicta* to be found in some of the cases to the effect that the mine owner will be liable to his neighbour for injury caused by his working his mine *negligently* (*c*), but the expression "negligence" must not there be understood in its ordinary sense, for the mine owner, provided he uses his mine in a natural way, that is to say, according to the ordinary and approved course of working, is not under any obligation to take any care at all. Those *dicta* were probably intended to refer to improper modes of working, such as that of interfering with the gravitation of the mine water, in which case the user is not natural in the legal sense of the term.

But a covenant inserted in a mining lease that the lessee shall win the coal "fairly, duly, honestly, and in a proper and workmanlike manner" will render such lessee liable in damages should he win the coal by an unfair and negligent but profitable system of mining (*d*).

The rule that a natural user of land will create no responsibility does not apply to the case of withdrawal of support. Though the removal of minerals is a natural user of mineral property, if by reason of such removal a subsidence occurs in the land of

tions would not, upon the principle of the mining cases above referred to, include the making of ridges and furrows where the object was to get rid of the water.

(*a*) *Giles* v. *Walker*, (1890) 24 Q. B. D. 656.

(*b*) See next page. But liability for damages resulting from non-natural user is limited to cases in which there has been nothing analogous to contributory negligence on the part of the plaintiff: *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Co.*, (1902) A. C. 381, P. C.

(*c*) *Per Cur.*, *Smith* v. *Kenrick*, (1849) 7 C. B. p. 564; *per* Erle, C.J., *Baird* v. *Williamson*, (1863) 15 C. B. N. S. p. 391.

(*d*) *Watson* v. *Charlesworth*, (1905) 1 K. B. 74, C. A.

the adjoining owner, the party causing the subsidence will be liable (*a*).

Mode of assessing damages.

In assessing the measure of damages in cases of subsidence the referee is not, however, entitled to include either an allowance for risk of future injury from probable further subsidence, or for present depreciation in value caused by the risk of future injury (*b*).

Act which the doer does at his peril.

2. To the second of the three classes of acts of user of property above mentioned, namely, that of acts lawful in themselves which the doer does at his peril, and liability for which is independent of any question of negligence, belong all those modes of user of land which are not included under the head of natural user.

Non-natural user of land.

Non-natural user of land may consist in some physical dealing with the soil itself, such as a mining operation not conducted according to the ordinary course of mining, or the making of a channel whereby the rain-water, the flow of which was theretofore distributed over a wide surface, is concentrated on a particular point and discharged upon the plaintiff's land below in such volume as to do damage, or the making of an embankment whereby the natural drainage of the soil is penned back to the damage of the plaintiff's land above, or the erection of an artificial mound of earth against the wall of the plaintiff's house whereby damp is caused to ooze through the plaintiff's wall and do damage (*c*).

Bringing on to land things likely to do damage if they escape.

Again, non-natural user of land may consist in bringing on to it things not naturally there; if any such thing having been so brought there escapes therefrom and does damage the owner will be liable, however great care he may have taken to prevent the escape. Thus, where the defendant had a privy adjoining the plaintiff's house, and, owing to the wall of the privy being out of repair, the filth from the privy flowed into the plaintiff's cellar, the defendant was held liable, not upon the ground of any

(*a*) *Humphries* v. *Brogden*, (1850) 12 Q. B. 739; *Earl of Westmoreland* v. *New Sharlestone Colliery Co.*, (1900) 82 L. T. 725; H. L.; *Bishop Auckland Co-operative Society* v. *Butterknowle Colliery Co.*, (1904) 2 Ch. 419. See below, p. 443.

(*b*) *Tunnicliffe & Hampson, Ltd.* v. *West Leigh Colliery Co.*, (1905) 74 L. J. Ch. 649.

(*c*) *Hurdman* v. *North Eastern R Co.*, (1878) 3 C. P. D. 168; *Broder* v. *Saillard*, (1876) 2 Ch. D. 692. Cp. *Giles* v. *Walker*, (1890) 24 Q. B. D. 656; as to which see above, p. 429.

prescriptive liability in him to repair the wall for the benefit of the plaintiff, but on the ground that "he whose dirt it is must keep it that it may not trespass" (*a*). In *Fletcher* v. *Rylands* (*b*) the defendants constructed a reservoir on land situate over some old mines which had been worked out. The plaintiff, the owner of an adjacent colliery, had by lawful working of his own mine opened a communication between it and the old workings under the site of the reservoir. The existence, however, of this communication was not known to the defendants, nor were they guilty of any negligence whatever in the course of their operations. Upon the reservoir being filled the water burst down into the old workings below and flowed through the underground communication into the plaintiff's mine. The House of Lords held, affirming the judgment of the Exchequer Chamber, that the defendants were liable. Blackburn, J., in delivering the judgment of the Exchequer Chamber, laid down the law as follows: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God. . . . The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbours', should be obliged to

Rule in *Fletcher* v. *Rylands*.

(*a*) *Tenant* v. *Goldwin*, (1704) 1 Salk 21 and 360; Lord Raym. 1089; *Brown* v. *Dunstable Corporation*, (1899) 2 Ch. 378.

(*b*) (1866–8) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches" (*a*). And this statement of the law was expressly approved and adopted by the House of Lords (*b*). A recent exemplification of this rule is afforded by the rather unusual case of *O'Gorman* v. *O'Gorman* (*c*), in which it was held that the defendant, who kept, "in an unreasonable place," "an unreasonable number of bees of a dangerous and mischievous nature, and accustomed to sting mankind or domestic animals," was liable to the plaintiff in damages for personal injuries resulting from his horse, owing to the stinging of the bees, plunging and throwing him down.

In one case the Divisional Court drew a distinction between the escape of fair water and that of foul, and while admitting that a householder would be liable for the escape of foul water from his waste-pipe, held that in the absence of negligence on his part he was not liable for damage done to the adjoining premises by the escape of water from the supply pipe through which his house was supplied from the neighbouring waterworks (*d*). This decision, however, seems irreconcilable with the reasoning of the Court of Appeal in *Anderson* v. *Oppenheimer* (*e*), where it apparently was conceded that in such a case the defendant would come within the principle of *Fletcher* v. *Rylands*. Moreover, the distinction between dirty water and clean seems unsatisfactory, for the latter will in many cases be as injurious as the former (*f*). Nor will the fact that the person fouling the water acted under statutory powers exonerate him from liability (*g*).

(*a*) (1866) L. R. 1 Ex. p. 279.

(*b*) (1868) L. R. 3 H. L. p. 340.

(*c*) (1903) 2 Ir. R. 573.

(*d*) *Sutton* v. *Card*, (1886) W. N. p. 120; and see *Brown* v. *Dunstable Corporation*, (1899) 2 Ch. 378 (a case of sewage); and *Gibbings* v. *Hungerford*, (1904) 1 Ir. R. 211, C. A.

(*e*) (1880) 5 Q. B. D. 602. See below, p. 441.

(*f*) A pipe carrying the drainage from two houses may be a sewer, although from one house it takes rain-water only: *Silles* v. *Fulham Borough Council*, (1903) 1 K. B. 829, C. A.

(*g*) *Batcheller* v. *Tunbridge Wells Gas Co.*, (1901) 84 L. T. 765. As to the responsibility *inter partes* when the damage complained of actually results from the act of a third party, see *Ely Brewery Co.* v. *Pontypridd Urban District Council*, (1904) 68 J. P. 3.

Thus, it has been held by the Privy Council in the recent case of *The Mayor and Corporation of Hawthorn* v. *Kannuluik* (*a*), that the appellant Mayor and Corporation were liable in damages (on the ground of negligence) for the flooding of the respondent's land with sewage, owing to the insufficient capacity of a sewer belonging to them.

Escape of electric current.

In *National Telephone Co.* v. *Baker* (*b*), the principle of *Fletcher* v. *Rylands* was held to apply to the escape of an electric current from the land of the party creating it. In that case a tramway company, who had statutory authority to use electrical power and who in fact used the best known system of electrical traction, by the working of their tramway caused electrical disturbance of the wires of a telephone company in the neighbourhood. Kekewich, J., was of opinion that, but for the fact that they were acting under statutory powers they would have been liable (*c*).

In *Firth* v. *Bowling Iron Co.* (*d*), the defendants' predecessors had fenced their land with wire rope, and the defendants continued the fence and occasionally repaired it. From long exposure the strands of the wire comprising the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces and died in consequence. It was held that the defendants were liable to compensate the plaintiff for the loss of the cow on the ground that they were bound to prevent portions of their wire from escaping on to their neighbour's land.

Growth of yew trees.

In *Crowhurst* v. *Amersham Burial Board* (*e*) the defendants planted on their land some yew trees, and allowed them to grow over the boundary so as to project over the adjoining field. The plaintiff, who was unaware of the existence of the yew trees, placed his horse at pasture in the field, and the horse ate some of the projecting branches of the yews and died in consequence. The defendants were held responsible, for, the trees being likely to do damage, they were bound to keep them in within the limits of their own land (*f*).

(*a*) (1905) 22 T. L. R. 28, P. C.

(*b*) (1893) 2 Ch. 186.

(*c*) And see *Eastern Telegraph Co.* v. *Cape Town Tramways Co.*, (1902) A. C. 381.

(*d*) (1878) 3 C. P. D. 254.

(*e*) (1878) 4 Ex. D. 5.

(*f*) The mere possession, however, of yew trees which do not project over the boundary, however close to the boundary they may be, does not impose on the owner any duty to fence them so as to prevent his neighbour's cattle in the field adjoining from putting their heads

And an injunction will lie against a person who allows the branches of his trees to overhang his neighbour's land, if thereby his neighbour's trees suffer damage (*a*).

One who is bound by prescription or otherwise to allow foreign matter to come on to his land is to be considered as bringing it there within the meaning of the rule. Thus, where an old drain, which commenced under the defendant's premises and received his sewage, ran under and received the sewage of several other houses, then turned back through the defendant's premises, and ran under the plaintiff's cellar and thence away to a main sewer, and, the part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowed into the plaintiff's cellar and did damage, it was held that the defendant was liable, notwithstanding that the drain was not known to the defendant to turn back and run under his premises and those of the plaintiff, and was not known to be out of repair, and the want of repair was not attributable to any negligence on his part (*b*). In that case the Court were of opinion that the fact of part of the sewage having come from the defendant's premises in the first instance was immaterial, and that, even if it had not, he would still have been liable, for "it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises on to the plaintiff's premises otherwise than along the old accustomed channel" (*c*).

Contamination of oyster beds.

It has been held in the recent case of *Foster* v. *Warblington Urban District Council* (*d*), that since the passing of the Sea Fisheries Act, 1868 (*e*), there can be no acquisition of a prescriptive right to discharge sewage into the sea, in any locality where such discharge will contaminate oysters in a private oyster bed.

over the boundary and browsing on them: *Ponting* v. *Noakes*, (1894) 2 Q. B. 281. Whether where the yews are adjacent to a high-road there is not such a duty as towards the owners of cattle passing along the high-road is doubtful. But possibly there is on the principle of *Barnes* v. *Ward*, (1850) 9 C. B. 392. See *per* Collins, J., in *Ponting* v. *Noakes*, (1894) 2 Q. B. p. 291.

(*a*) *Smith* v. *Giddy*, (1904) 2 K. B. 448.

(*b*) *Humphries* v. *Cousins*, (1877) 2 C. P. D. 239.

(*c*) *Ibid.* p. 244. In the metropolis the division of responsibility between the particular owner of property and the London County Council in the case of a sewer (that is, a drain used for the drainage of more than one building) is varied by a statute. See also *Nathan* v. *Rouse*, (1905) 1 K. B. 527.

(*d*) (1905) 3 L. G. R. 605.

(*e*) 31 & 32 Vict. c. 45.

Liability for damage by fire independent of negligence.

The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it in at his peril. "If my fire by misfortune burn the goods of another man, he shall have an action on the case against me" (*a*). "If my servant put a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbour, an action on the case lies against me" (*b*). And the person who kindles a fire in an open field in the way of husbandry is as much liable for the escape of the fire as if he had made it in a house; "he must at his peril take care that it does not, through his neglect, injure his neighbour" (*c*).

Common law rule as to fire.

By the common law indeed not only was a person who kindled a fire absolutely liable to others whose property was injured by such fire spreading, but there was also a presumption of law that every fire originating upon a person's premises, the original kindling of which could not be traced, was kindled by the owner of the premises or his servants, for whose acts he was responsible. If the fire could be traced to the unauthorised act of a stranger (*d*), or even of a lodger (*e*), the owner of the premises was not liable, but in the absence of such proof of its origin it was presumed to be his fire (*f*). "If a fire light suddenly in my house I knowing nothing of it, and it burn my goods and also the house of my neighbour, an action on the case lies against me by him" (*g*).

How far affected by statute.

By 6 Ann. c. 31, s. 6, however, the law in this respect was altered, and it was provided that no action should be brought against any person in whose house or chamber any fire should accidentally begin. That Act has been repealed, but the provision of the above section is re-enacted, with this modification, that it is extended to fires other than domestic fires, in the Metropolitan Building Act, 14 Geo. III., c. 78, s. 86, which provides that no action shall be maintained against any person "in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin," and which section, although occurring in a local Act, has been decided

(*a*) Rolle, Ab. Action sur Case, B. 1.

(*b*) *Ibid.* B. 3.

(*c*) *Tuberville* v. *Stamp*, (1697) 12 Mod. 152.

(*d*) Rolle, Ab. Action sur Case, B. 6.

(*e*) *Allen* v. *Stephenson*, (1700) 1 Lutw. 90.

(*f*) See *per* Lord Tenterden, C.J. *Becquet* v. *Macarthy*, (1831) 2 B. & Ad. p. 958.

(*g*) Rolle, Ab. Action sur Case, B. 2.

to be a general law applicable to the whole kingdom (*a*), although in a modern case (*b*) its application to Scotland has been doubted. The effect of these statutes, it is apprehended, was merely to shift the *onus* of proof, by doing away with the presumption that the fire was kindled by the owner of the premises, and to leave the rule as to the extent of the liability of the party who is proved to have kindled it exactly as it was by the common law. The words "accidentally begin" refer to the original kindling of the fire, not to its spreading. Thus where a man lit a fire in his field and the wind caused it to spread and burn the plaintiff's trees in the adjoining field, the case was held not to be within the Act (*c*), one of the reasons being that the fire "did not begin accidentally, but was knowingly lighted by the defendant himself" (*d*). So, too, if a person, without express statutory authority, use locomotive steam engines on his land and sparks escape from the engines and do damage, he will be liable although he may have taken all possible precautions to prevent the escape of the sparks (*e*); and no distinction can properly be drawn between the case of a fire in a steam-engine and any other kind of fire, for the language of the Act is perfectly general. If then a person light a candle in his house, and while carrying it accidentally stumble and set fire to the curtains, and the fire spread to the house of his neighbour, apparently he will have no defence, the statute notwithstanding, though perhaps in such case one might properly differentiate between the original intentional lighting of the candle and the subsequent accidental ignition of an altogether different article by reason of the fortuitous stumble of the person carrying the candlestick. It may seem remarkable that if the above statement of law be accurate no action for damage caused by fire accidentally spreading from one house to another should ever have been brought since the passing of the above statute of Anne. But it is a sufficient answer to any objection founded upon that fact to point out that neither is

(*a*) *Filliter* v. *Phippard*, (1847) 11 Q. B. 347; note especially pp. 354, 355.

(*b*) *Westminster Fire Office* v. *Glasgow Provident Investment Society*, (1888) 13 A. C. 699, Lord Watson at p. 716.

(*c*) *Filliter* v. *Phippard*, (1847) 11 Q. B. 347.

(*d*) *Per cur.*, *Filliter* v. *Phippard*, p. 358; and see *Vaughan* v. *Menlove*, (1837) 3 Bing. N. C. 468.

(*e*) *Jones* v. *Festiniog R. Co.*, (1868) L. R. 3 Q. B. 733; *Powell* v. *Fall*, (1880) 5 Q. B. D. 597.

any trace to be found in the books since that date of any action for *negligently* causing fire to spread from one house to another, although cases must arise every day in which it could be clearly proved that the spread of the fire was due to the grossest carelessness, and there is express authority that the statute does not protect any one who has been guilty of negligence (*a*).

The fire must be defendant's fire.

A person however will only be held responsible for damage by fire, if it be proved that the fire is *his* fire, if, that is to say, he caused the original ignition; but this he will have done none the less because such ignition was unintentional, if he brought into contact substances which spontaneously ignited under conditions making such spontaneous combustion antecedently probable. Thus where a person made a stack of hay on the edge of his land in such a green condition that it was likely to ignite, and did ignite, and the fire burnt the plaintiff's cottages adjoining, the owner of the stack was held liable (*b*). This case is sometimes said to have proceeded on the ground of negligence, but the negligence charged against the defendant was not in omitting to take precautions to prevent the fire spreading, but in stacking the hay while green, without which the fire could not have been said to be the defendant's fire at all. In the course of his judgment Tindal, C.J., puts the case of a chemist making experiments with ingredients, singly innocent, but, when combined, liable to ignite; if he leaves them together and injury is thereby occasioned to the property of his neighbour, it cannot be doubted that he would be liable (*c*). The fire resulting from such combination, although unintentional, is the defendant's fire within the meaning of the rule.

Spontaneous ignition.

Damage by gas, explosives, or electricity.

So, too, one who brings gas on to his premises, or stores gunpowder or other explosives there, is presumably liable if an explosion occurs which does damage, without any proof of negligence. The storage of explosives is now regulated by the Explosives Act, 1875 (*d*), under which the maximum amount of gunpowder which may be kept in any one place for private use is thirty pounds, while gunpowder kept in larger quantities, or

(*a*) *Filliter* v. *Phippard*, (1847) 11 Q. B. 347.

(*b*) *Vaughan* v. *Menlove*, (1837) 3 Bing. N. C. 468.

(*c*) *Vaughan* v. *Menlove*, (1837) 3 Bing. N. C. at p. 474.

(*d*) 38 Vict. c. 17.

for purposes of sale, can only be lawfully stored in specially licensed or registered premises. Even should an explosion occur in premises duly licensed under the Act, the owner would still be liable for damage accruing to his neighbours therefrom, for there is nothing in the statute to take away private rights of action for injuries arising from the keeping of explosives; while if explosives be stored in breach of the regulations of the Act, and an explosion should occur as the result of their being struck by lightning, it may well be doubted whether the act of God (*a*) would in such case afford any defence, the mere keeping of the explosives being, under the circumstances, *per see* unlawful.

In the case of an explosion in an electric main, caused by insufficient ventilation, it was held recently that the local authority to whom it belonged was liable in damages to a passer by for injuries sustained by her from nervous shock (*b*).

Defendant liable only where thing complained of escaped of itself.

The rule of law as laid down in *Fletcher* v. *Rylands* (*c*) includes all kinds of things likely to do mischief if they escape, but in order to bring a case within that rule the thing whose escape is complained of must have escaped of itself, that is to say, either voluntarily and of its own motion, as in the case of a beast trespassing, or else by the mere operation of one of the ordinary forces of nature, such as gravity in the case of water flowing from a reservoir or filth from a privy, combustion in the case of gunpowder exploding or fire spreading, and diffusion in the case of gases escaping from chemical works. The rule does not apply to a case in which the thing complained of has been actually removed from off the defendant's land by a third person. Thus a declaration averring that the defendant was possessed of yew trees, and that it was his duty to prevent the clippings from being placed on land not occupied by him, and that he took so little care of the clippings that they were placed on land not occupied by him, whereby the plaintiff's horses were poisoned, was held bad on demurrer on the ground that it was consistent with the declaration that the clippings might have been carried on to the plaintiff's land by a stranger without the defendant's knowledge (*d*). A distinction, however, is here apparently to be

(*a*) As to which, see below, p. 453.

(*b*) *Solomons* v. *Stepney Borough Council*, (1905) 3 L. G. R. 912.

(*c*) (1866) L. R. 1 Ex. p. 279.

(*d*) *Wilson* v. *Newberry*, (1871) L. R. 7 Q. B. 31.

drawn between such a case as this last in which the act of the third party was the sole motive power which changed the local position of the thing which did the damage, the thing having no tendency to escape of itself, and a case in which, the thing having a tendency to escape of itself, the act of the third person has consisted in removing the barrier or bond that confined it, as for instance, where a stranger has wrongfully damaged the embankment of the defendant's reservoir, whereby the water has flowed out, or has opened the gate of the defendant's field, whereby his cattle have escaped. In the latter, it is conceived, the defendant will be responsible for the escape, notwithstanding the intervening wrongful act of the third person. This distinction is no doubt somewhat fine, but it seems warranted by the authorities (*a*).

Rule of *Fletcher* v. *Rylands* applies to escape of solid bodies as well as of fluids.

But as the law of gravitation applies as well to solid bodies as to fluids, it is apprehended that a solid body placed at a distance from the ground in a position in which from want of cohesion it may fall is a thing having a tendency to escape within the meaning of the rule, and that if it falls from such position of its own weight and does damage, the owner who placed it there will be responsible (*b*). Thus where the defendant was possessed of a lamp which projected several feet from his house over the public foot pavement, and the lamp, owing to decay of part of the iron-work, but without, as the jury found, any negligence on the part of the defendant, fell and injured a passer-by, the defendant was held liable on the ground that the duty of a person who maintains for his own purposes something projecting over a highway is a

(*a*) See below, p. 455.

(*b*) The ground upon which Blackburn, J., in *Fletcher* v. *Rylands*, (1866) L. R. 1 Ex. p. 286, distinguished the case of *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596, where a bale of cotton which the defendants' servants were lowering fell upon the plaintiff, namely, that the plaintiff by being on the defendants' premises took the risk of inevitable accident on himself, shows that in his opinion no distinction in this respect was to be drawn between solid bodies and fluids. It follows that had the bale fallen on the plaintiff while standing on his own land adjoining that of the defendants, Blackburn, J., would have held them liable without proof of negligence. And see *Marney* v. *Scott*, (1899) 1 Q. B. 986. But whether in so extending the principle of *Fletcher* v. *Rylands* to the fall of chattels which are in course of being handled he would not have been going too far may well be doubted. It is presumed that the principle must be regarded as confined to the escape of injurious things which have been left by the defendant in a condition of rest.

duty to keep it in such a state as not to damage the public (*a*), and the language of the majority of the Court suggested that that duty extends even to latent defects (*b*). So if a brick or stone falls out of the wall of a building, or a tile or chimney-pot from the roof, the owner of the premises will probably be responsible for any damage that may be caused thereby, irrespective of any question of negligence. It will be no defence that he employed a competent and experienced contractor to put the premises into a proper state of repair (*c*), and yet so far as care is concerned he clearly could do no more; the reason being that he who maintains bricks, tiles, or other bodies in a position from which they may fall by their own weight maintains them there at his peril (*d*). In the case of *Kearney* v. *London, Brighton, &c., R. Co.* (*e*), where a brick fell out of the pier of a railway bridge upon a person walking in the high-road below, and where, the judge having left the case to the jury on the issue of negligence, the question afterwards argued before the Exchequer Chamber was, whether there was evidence of negligence to go to the jury, it seems indeed to have been assumed that the common law obligation of the owner of premises in such a case is limited to the exercise of care, but that assumption is irreconcilable with *Tarry* v. *Ashton*. No doubt in *Kearney* v. *London, Brighton, &c., R. Co.*, it was essential to prove negligence, for the defendants in erecting and maintaining their pier acted under statutory powers, and so brought themselves within the principle of *Vaughan* v. *Taff Vale R. Co.* (*f*), but that was not the ground upon which the case was argued. Possibly the Court may have paid more attention to the fact that proof of negligence was necessary than to the grounds upon which such necessity rested (*g*). In *Morgan* v. *Hart* (*h*), where an action was brought for injuries sustained from the falling of a signboard which was attached to the outside of the defendant's shop, the

(*a*) *Tarry* v. *Ashton*, (1876) 1 Q. B. D. 314.

(*b*) Blackburn, J., though doubting on this point, declined to decide the contrary. Having regard to his judgment in *Fletcher* v. *Rylands* (see note, p. 439), it is somewhat remarkable that Blackburn, J., should have been the one member of the Court to entertain any doubt upon this point.

(*c*) *Tarry* v. *Ashton*, *supra*.

(*d*) See too *Firth* v. *Bowling Iron Co.*, (1878) 3 C. P. D. 254.

(*e*) (1871) L. R. 6 Q. B. 759.

(*f*) (1860) 5 H. & N. 679. See above, p. 408.

(*g*) (1871) L. R. 6 Q. B. p. 761.

(*h*) Times, Nov. 27, 1888.

judge at the trial, there being no evidence of negligence, entered judgment for the defendant, and on appeal this judgment was affirmed by the Court of Appeal. There was evidence that the day on which the accident happened was exceptionally windy and stormy, but whether the Court went upon the ground that the accident was due to the act of God, or that the falling of solid bodies did not come within the principle of *Fletcher* v. *Rylands*, did not appear. The question whether that principle does or does not extend to the escape of solid bodies cannot be regarded as definitely settled, though to hold that it does not would necessarily involve a surrender of logical consistency.

Application of the rule as between occupiers of different floors in same house.

A person, however, will not in all cases bring himself within the principle of *Fletcher* v. *Rylands* if he has brought the foreign matter on to the place from whence it escaped, not for his own purposes only, but for the common purposes of himself and the plaintiff. In *Anderson* v. *Oppenheimer* (*a*) the plaintiffs were tenants of the ground floor and basement of a house of which the defendant was owner, the upper floors being let out to separate tenants. The different floors were supplied with water from a cistern at the top of the house. The branch service pipe supplying the first floor burst, and the basement was flooded. The case was held not to be within the rule of *Fletcher* v. *Rylands* on the ground that the water service as a whole was for the common benefit of the plaintiffs and the other tenants; but it was suggested by Thesiger, L.J., that "if the apparatus for storing and distributing the water had been entirely unconnected with the plaintiff's premises, the matter might have worn a different aspect." This *dictum*, however, must be read as intended to be limited to cases in which the water-service apparatus has been introduced into the house after the commencement of the plaintiff's tenancy, for if the water were laid on to the upper floor before the plaintiff entered into occupation of the lower, he could not complain. "One who takes a floor in a house must be held to take the premises as they are" (*b*). And this was the view taken by the Queen's Bench in *Ross* v. *Fedden* (*c*). There the plaintiff occupied the ground floor and

(*a*) (1880) 5 Q. B. D. 602.

(*b*) *Per* Martin, B., *Carstairs* v. *Taylor*, (1871) L. R. 6 Ex. p. 222.

(*c*) (1872) L. R. 7 Q. B. 661.

the defendants the second floor of the same house. In the defendants' premises was a water closet, to which they alone had access, and which closet was assumed, there being no evidence to the contrary, to have been put up by the landlord before the plaintiff came into occupation. The waste pipe of the closet, without any negligence on the part of defendants, got stopped up with paper, which caused the water in the pan to overflow and so to flood the plaintiff's premises. It was held that the defendants were not liable for the damage, upon the ground that the person who takes a floor of a house takes it "subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule laid down in *Fletcher* v. *Rylands*, and, in the absence of negligence, is not liable for the consequences" (*a*). From the above-cited *dictum* of Thesiger, L.J., it appears that, except as above, the principle of *Fletcher* v. *Rylands* applies as well between the occupants of different floors of a house as between adjacent owners of land, a point which was left in doubt in the earlier case of *Carstairs* v. *Taylor* (*b*). Thus in *Abelson* v. *Brockman* (*c*) where an overflow of water, from the upper on to the lower stories of a house, was occasioned by the introduction of foreign matter into the waste pipe of a sink, the defendant was held liable, although the Court (Pollock, B.) expressly distinguished the case from *Fletcher* v. *Rylands*.

Liability of owner of tenement house.

Again, where a house is let in separate flats and the possession of the structure as a whole remains in the landlords, the tenants of the separate floors are entitled to require from the owner of the property the due exercise of all reasonable precautions to prevent the accrual of damage.

Thus where a rain water gutter on the roof of a building, let out in tenements, was under the control of the landlords and they neglected, after notice given, to clean it out, with the result

(*a*) *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661 at p. 663. The Judges of the Q. B. adopted the reasoning of the County Court Judge, before whom the case was tried. And a similar decision was arrived at, though on different grounds, in the subsequent case of *Sterens* v. *Woodward*, (1881) 6 Q. B. D. 318.

(*b*) (1871) L. R. 6 Ex. 217.

(*c*) (1890) 54 J. P. 119.

that the occupants of one of the flats suffered damage by reason of an overflow of rain water, it was held by the Court that the landlords were guilty of negligence and consequently responsible for the damage resulting from their want of care (*a*).

Withdrawal of support.

If the owner of land, in the course of mining operations or otherwise, excavates his soil and thereby withdraws the support to which the land of his neighbour is entitled, though such act of excavation is lawful in itself (*b*) he nevertheless does it at his peril; and if in consequence of the withdrawal of the support a subsidence in his neighbour's land occurs, he will be liable, however great care he may have taken to prevent such an occurrence by substituting props or shores for the support which he has taken away (*c*). "If the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial" (*d*). In *Haines* v. *Roberts* (*e*), where the plaintiff's buildings were damaged by the defendant's mining operations, and the jury negatived negligence, it was held that such finding did not affect the plaintiff's right to recover (*f*). And it is apprehended that this rule, that a person who withdraws the support to which another is entitled does so at his peril, is not confined to cases in which the plaintiff's land is in its natural condition unburdened with the weight of houses, but equally applies where a right to an additional amount of support has been acquired by prescription (*g*).

Coal plates and cellar flaps.

Every person who maintains an ordinary domestic coal plate or cellar flap in the pavement of a highway does so apparently at his peril (*h*). For the plate or flap is nothing more than a horizontal fence of a dangerous excavation in the road. And a

(*a*) *Hargroves, Aronson & Co.* v. *Hartopp and Another*, (1905) 1 K B. 472.

(*b*) *Backhouse* v. *Bonomi*, (1858–61) 9 H. L. C. 503.

(*c*) *Humphries* v. *Brogden*, (1850) 12 Q. B. 739; and see *Tunnicliffe & Hampson, Ltd.* v. *West Leigh Colliery Co.*, (1905) 74 L. J. Ch. 649; and *Barr* v. *Baird & Co.*, (1904) 6 F., Ct. of Sess. 524.

(*d*) *Per* Martin, B., *Brown* v. *Robins*, (1859) 4 H. & N. p. 193.

(*e*) (1857) 7 E. & B. 625

(*f*) See, too, *Stroyan* v. *Knowles*, (1861) 6 H. & N. 454.

(*g*) In the cases above cited this point was not raised, for in none of them was there any suggestion that the weight of the buildings had contributed to cause the subsidence. But see *per* Littledale, J., *Dodd* v. *Holme*, (1834) 1 A. & E. p. 503.

(*h*) Nor does it amount to contributory negligence for a member of the public to stand on a grating, *Gwinnell* v. *Eamer*, (1875) L. R. 10 C. P. 658.

duty to fence, where it exists, has been held to be an absolute duty (*a*). Consequently if a third person wrongfully tampers with the plate or flap whereby a passer-by falls into the hole and is injured the occupier of the premises will be liable. This duty to fence extends to private ground that is both open and adjacent to a public highway. Though what constitutes sufficient proximity to support an action is a matter to be deduced from the facts arising in each particular case (*b*).

Liability for damage done by animals.

Another class of acts lawful in themselves which a person does at his peril, and his liability for which is independent of any question of negligence, is that of keeping animals of a kind likely to do damage if they escape. A man who keeps an animal is liable for all the damage which he knows that it is likely to commit; or which he ought to know as matter of common knowledge that it is likely to commit, by reason of the fact that it is according to the common experience of mankind, part of the ordinary nature of such animal to commit damage of that kind if suffered to be at large (*c*). Every man must be taken to know that animals *feræ naturæ*, such as monkeys, are prone to bite, though not shown to be vicious beyond the average of their species—that a savage beast such as a tiger if it escapes will act after its kind. "Though (the owner) have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage" (*d*). An elephant is an animal *feræ naturæ* for this purpose (*e*).

Animals *feræ naturæ*.

Animals known to have contagious disease.

Animals suffering from a contagious disease are likely if they escape, to infect other animals with which they may come into contact, and their owner, therefore, if he knows that they are so diseased is bound to keep them in at all hazards. Where the defendant's sheep, being diseased with scab, by some unexplained means got into the plaintiff's field and infected the plaintiff's sheep, in the absence of evidence of knowledge that the sheep

(*a*) *Lawrence* v. *Jenkins*, (1873) L. R. 8 Q. B. 274. See below, p. 455.

(*b*) *Derlin* v. *Jeffray's Trustees*, (1903) 5 F. 130, Ct. of Sess.

(*c*) *O'Gorman* v. *O'Gorman*, (1903) 2 Ir. R. 573.

(*d*) Hale, P. C., Vol. 1, p. 430. And see *May* v. *Burdett*, (1846) 9 Q. B. 101.

(*e*) *Filburn* v. *People's Palace & Aquarium Co.*, (1890) 25 Q. B. D. 258.

were scabby the defendant was held not liable, but it was not disputed that had he known it he would have kept them at his peril (*a*). The keeping of animals suffering from contagious diseases is now to some extent regulated by Act of Parliament (*b*).

Animals *domitæ naturæ* following their natural propensities.

It is part of the ordinary nature of horses to kick, or bite, *one another* in quarrel or sport, at all events when they are loose in a field, and especially is it natural for stallions to bite or kick mares, and therefore in an action brought for an injury caused by one horse to another under such circumstances it is unnecessary to show that the defendant knew of any peculiar vicious disposition on the part of his horse (*c*). But it is not so much in the ordinary nature of horses to kick *human beings*, as it is to kick their own species, and therefore where a horse on a highway kicked a child it was held that in the absence of proof of knowledge of a special vicious disposition the owner was not liable (*d*). Although probably the infrequency of kicking in the one case and the frequency in the other is less a matter of propensity than of opportunity, especially as kicking, at least with the hind legs, is a much less usual method of attack than is biting, when stallions fight with each other. It is probably to be regarded as part of the ordinary nature of bulls to attack horses, and consequently "it might be argued that the owner of a bull who allowed it to escape would be liable if it attacked a horse" without notice of any peculiar vice in the bull (*e*). The point, however, has never been expressly decided in this country. In America it has been held that the owner of the bull under such circumstances is liable (*f*).

Trespasses by cattle, &c.

Again, it is part of the ordinary nature of all animals, however tame, to wander wherever their instinct leads them, and so commit trespasses, as where cattle or horses break into a

(*a*) *Cooke* v. *Waring*, (1863) 2 H. & C. 332.

(*b*) 57 & 58 Vict. c. 57. For Statutory regulations respecting carriage of animals, see 41 & 42 Vict. c. 74, s. 33.

(*c*) *Lee* v. *Riley*, (1865) 18 C. B. N. S. 722; *Ellis* v. *Loftus Iron Co.*, (1874) L. R. 10 C. P. 10.

(*d*) *Cox* v. *Burbidge*, (1863) 13 C. B. N. S. 430. This appears to be the true ground upon which this case is to be distinguished from the two last. It was upon this ground that the County Court Judge in *Lee* v. *Riley* distinguished it, and it does not appear that on appeal the Court of Common Pleas in any way disapproved his reasoning.

(*e*) *Per* Blackburn, J., *Smith* v. *Cook*, (1875) 1 Q. B. D. p. 83.

(*f*) *Dolph* v *Ferris*, (1844) 7 Watts & Serg. (Penns.) 361.

cornfield and eat or trample down the corn. "If a man's cattle, sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences" (*a*). So the owner of a dovecote is liable if his pigeons eat his neighbour's corn. The keeping of a dovecote is not indeed a public nuisance, but any private injury resulting from it is actionable, and "if the pigeons fly abroad to the damage of the King's subjects, the Judges of Assize may take cognizance of it" (*b*).

Exception to liability for trespassing cattle where they stray off highway.

But although it is in the nature of all animals to trespass, there is an exception to the owner's *primâ facie* liability in cases in which the trespass is committed from off a highway by an animal which, being lawfully on the highway at the time, escapes therefrom on to the adjoining land, the law in this matter discriminating between animals accidentally straying from a drover's control and cattle wandering unattended on the highway (*c*). In the former case to establish liability in the owner it is necessary to prove negligence on the part of the person in charge of the animal at the time of the accident. Therefore where an ox belonging to the defendant, whilst being driven by his servants through the streets of a town entered the plaintiff's shop, which adjoined the street, and damaged his goods, there being no proof of negligence on the part of the persons in charge of the ox, the defendant was held not liable (*d*). This exception rests apparently on the broad ground that, traffic on highways being necessary to the public welfare, it is for the public convenience that those whose property is adjacent to highways should bear the loss of any injury necessarily resulting from such traffic. Blackburn, J., in *Fletcher* v. *Rylands* (*e*) suggests that the reason of the exception is that he who has his property in the neighbourhood of a highway takes upon himself the risk of injury from the danger incident to the traffic. This suggestion, however, can hardly be

(*a*) *Per* Williams, J., *Cox* v. *Burbidge*, (1863) 13 C B. N. S. p. 438.

(*b*) *Dewell* v. *Sanders*, (1618) Cro. Jac. 490; and see *per* Bayley, J., *Hannam* v. *Mockett*, (1824) 2 B. & C. p. 940.

(*c*) *Luscombe* v. *Great Western Ry.* (1899) 2 Q. B. 313.

(*d*) *Tillett* v. *Ward*, (1882) 10 Q. B. D. 17.

(*e*) (1866) L. R. 1 Ex. p. 286.

regarded as satisfactory, for the owner of fixed property has no power to change its local position, and therefore his having his property where it is is not a voluntary act. The owner of animals, however, which stray off a highway on to the adjoining land is bound to drive them off again with all reasonable speed; if he leave them on the land where they are trespassing longer than is reasonably sufficient for the purpose, the owner of the land may distrain them *damage feasant* (*a*). It was decided in the case of *Powell* v. *Full* (*b*) that the owner of a locomotive traction engine was liable independently of negligence for injury to a haystack, caused by sparks escaping from the engine, although at the time of the escape it was passing along a high road. The extent of the obligation in respect of fire and beasts being precisely the same where the escape is from the owner's land, it is difficult to see why the exemption in the case of beasts where the escape is from a highway should not equally exist in the case of fire, at all events where the fire is of such a kind as is not unusually met with on high roads; and as it is usual and necessary in the interests of agriculture, that traction engines should travel about the country, the danger arising from sparks escaping from such engines ought to be regarded as one of the risks ordinarily incident to the traffic. But this point was not taken, and the case turned entirely upon the question as to whether any special protection was afforded by the Locomotive Acts.

Natural propensities of dogs.

Whether there is not a natural propensity in all dogs to chase and destroy game is doubtful, but probably there is (*c*). The propensity of dogs to worry sheep or cattle would seem upon the border line, and accordingly the Courts formerly held (*d*) special proof of a *scienter* to be necessary to fix the owner with liability. But it is now provided by 28 & 29 Vict. c. 60, s. 1, that "The owner of every dog shall be liable in damages for injury done to cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a mischievous propensity in

(*a*) *Goodwyn* v. *Cheveley*, (1859) 4 H. & N. 631.

(*b*) (1880) 5 Q. B. D. 597.

(*c*) In *Read* v. *Edwards*, (1864) 17 C. B. N. S. 245, where the owner of a dog which killed some young pheasants was held liable, he was proved to have had notice of a special tendency in the dog to kill game.

(*d*) See *Orr* v. *Fleeming*, (1855) 2 Macq. 14.

such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of the owner." The word cattle in this section has been held to include horses and mares (*a*), though in such decision the probable object of the Legislature seems to have been lost sight of, it not being natural for dogs to worry horses. By s. 2 of the same Act, which seems, however, to be merely declaratory of the common law on the subject (*b*), it is enacted that "the occupier of any house or premises where any dog was kept or permitted to live or remain at the time of such injury shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge."

Trespasses by animals which are not the subject of larceny.

Some of the old cases seem to suggest that, as regards liability for destruction of crops or other injuries consequent upon trespasses on land committed by animals, a distinction is to be drawn between animals which are the subjects of larceny, such as cattle, poultry or pigeons, and those which are not, such as dogs and game. Thus, in *Mason* v. *Keeling*, Holt, C.J., said, "If any beast in which I have a valuable property do any damage in another's soil in treading his grass tresspass will lie for it, but if my dog go into another man's soil no action will lie for it" (*c*). This distinction is probably a purely academic one at the present day, the stealing of dogs being now a statutory offence under ss. 18—20 of the Larceny Act, 1861. Prior to the passing of this Act in *Brown* v. *Giles* (*d*), where the defendant was sued in trespass because his dog jumped over the hedge into the plaintiff's close, Park, J., directed a nonsuit. In this case, however, there was no evidence, as far as appears from the report, of any damage. It cannot be regarded as an authority for the proposition that where dogs stray without default on the part of the owner no action lies however great the damage caused. In *Saunders*

(*a*) *Wright* v. *Pearson*, (1869) L. R. 4 Q. B. 582.

(*b*) See *M'Kone* v. *Wood*, (1831) 5 C. & P. 1.

(*c*) (1699) 12 Mod. p. 335. This *dictum* was wholly unnecessary to the decision, the action being for injuries caused by the defendant's dog biting the plaintiff.

(*d*) (1823) 1 C. & P. 118.

v. *Teape* (*a*), where the plaintiff was digging a well in a garden adjoining that of the defendant, and the defendant's dog in play jumped over the wall separating the two gardens, fell down the well and injured the plaintiff, it was held that the defendant was not liable. But that case may possibly be explained on the ground that the damage was too remote. In one case an owner of a dog was held liable in trespass for the dog killing a deer, without proof of knowledge of any peculiar vice, on the strange ground that he himself was at the time trespassing in company with the dog on the field in which the deer was (*b*). And in the modern case of *Grange* v. *Silcock* (*c*) the owner was held liable under s. 1 of the Dogs Act, 1871, for his dog worrying and killing sheep that were trespassing on his land. In the old case of *Bowlston* v. *Hardy* (*d*) a declaration that the defendant was seised of lands adjoining those of the plaintiff and had made two coney burrows thereon, and had put conies in them, which increased to a great number, and went into the plaintiff's land and destroyed his corn and made it barren, was held bad on demurrer, on precisely the same ground as that given by Holt, C.J., in the case of dogs, that the defendant had no property in the conies. But this ground, if good, would offer an objection to an action lying in almost all cases of nuisance; for instance, the owner of a reservoir or of alkali works has no property in the water which escapes from the one, or the fumes which escape from the other, after they have escaped and at the time they are doing the damage. In *Cox* v. *Burbidge* (*e*), Willes, J., disapproved Lord Holt's *dictum* with reference to non-liability for trespasses by dogs, and expressed himself to be unable to see the distinction between animals in which the owner has a valuable property and those in which he has not; and in a subsequent case (*f*) the same judge, delivering the judgment of the Court, treated the question as an open one "whether the owner of a dog is answerable in trespass for every unauthorised entry of the animal into the land of another," including bare trespasses; from which language it may be inferred that the balance of his mind was in the direction of holding that

(*a*) (1884) 51 L. T. N. S. 263.
(*b*) *Beckwith* v. *Shordike*, (1767) 4 Burr 2093.
(*c*) (1897) 77 L. T. 340.
(*d*) (1597) Cro. Eliz. 547.
(*e*) (1863) 13 C. B. N. S. p. 440.
(*f*) *Read* v. *Edwards*, (1864) 17 C. B. N. S. 245.

Shooting trespassing dogs.

for a trespass causing substantial damage the owner would be liable. In the case of a landowner or his servant shooting a trespassing dog it is, however, necessary in order to avoid liability under the Malicious Damage Act, 1861 (*a*), to show that the act complained of was done in a *bonâ fide* belief that it was essential for the protection of property (*b*). To revert to trespass by animals, in the case of *Farrer* v. *Nelson* (*c*), Pollock, B., dealing with a question of damage by rabbits, expressed himself in terms with which it would be difficult to reconcile the case of *Bowlston* v. *Hardy* (*d*). "I will first deal," he said, "with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule '*sic utere tuo ut alienum non lædas.*'" The question, therefore, in the case of game also may still be considered to be open; and it is certainly difficult to see why the Courts should hold damage caused by dogs or game to form any exception to the general rule. With regard to game, however, it is to be observed that in order to bring the defendant within the general principle laid down in *Fletcher* v. *Rylands*, it must be shown that the game complained of is *his* game. It will not be enough for this purpose that it has come from the defendant's land; he must have actively interfered to bring about its existence there, as by bringing it upon his land from elsewhere, or perhaps by artificially increasing the quantity naturally present by destroying the vermin that would in the ordinary course of things prey upon it. Mere neglect to kill the game down would probably impose no liability, for it could not in such case be regarded as *his* game.

Damage by rabbits and game.

Animals known to have a peculiarly vicious tendency.

In cases of animals doing damage of a kind which it is no part of their ordinary nature to do it is essential, in order to render the person keeping them liable therefor, to show that he had knowledge of a peculiar vicious tendency in the animal to do

(*a*) 24 & 25 Vict. c. 97, s. 41.

(*b*) *Miles* v. *Hutchings* (1903), 2 K. B. 714; and see *Armstrong* v. *Mitchell*, (1903) 88 L. T. 870.

(*c*) (1885) 15 Q. B. D. p. 260.

(*d*) (1597) Cro. Eliz. 547.

damage of that particular kind. It not being usual for dogs (*a*), or horses (*b*), or rams (*c*), or bulls (*d*) to attack human beings, the plaintiff complaining of such injury from such animals must establish that the defendant knew they were exceptionally savage and prone to injure mankind (*e*). It is not necessary, in order to sustain an action for a bite given by a savage dog, to show that the dog has actually bitten another person before it bit the plaintiff, it is enough to show that it has to the knowledge of the defendant evinced a savage disposition by attempting to bite (*f*). Nor, it is presumed, is the peculiar vicious tendency in a dog, knowledge of which will render the owner liable, confined to a tendency to bite. It probably extends to any known vicious habit likely to cause damage, such as the not uncommon habit of rushing out of a gate and barking at passing horses, whereby the horses become frightened and bolt. In one case of *nisi prius* where the plaintiff was driving a mare past the defendant's house when the defendant's dogs rushed out barking and snapping at the mare's heels, which caused her to plunge and kick whereby she eventually fell down and injured herself, Bramwell, B., directed the jury that if the dogs were mischievous and the defendant knew it he was liable (*g*). The jury found for the plaintiff, and no attempt seems to have been made to disturb the verdict. But in such cases it would always be a question of degree whether the fear inspired in the horse was under the circumstances natural, or whether it was due to exceptional timidity on its part. Where the owner of a dog appoints a servant to keep it, it is not necessary that the owner should have personal knowledge of the dog's ferocity, the knowledge of such servant is enough (*h*). But knowledge of a servant not appointed to keep it will not *per se* suffice to charge the

Where *scienter* of owner's servant sufficient.

(*a*) *Mason* v. *Keeling*, (1699) 12 Mod. 332.

(*b*) *Cox* v. *Burbidge*, (1863) 13 C. B. N. S. 430.

(*c*) *Jackson* v. *Smithson*, (1846) 15 M. & W. 563.

(*d*) *Hudson* v. *Roberts*, (1851) 6 Ex. 697.

(*e*) See *Osborn* v. *Chocqueel*, (1896) 2 Q. B. 109.

(*f*) *Worth* v. *Gilling*, (1866) L. R. 2 C. P. 1.

(*g*) *Read* v. *King*, Times, Jan. 27, 1858. *Quære* whether since the statute 28 & 29 Vict. c. 60 (as to which, see above, p. 447), the owner would not be liable in such a case without any special knowledge of a mischievous propensity in the dog.

(*h*) *Baldwin* v. *Casella*, (1872) L. R. 7 Ex. 325.

master, though if under the circumstances it would be the duty of such servant on becoming aware of the animal's ferocity to inform the master, which in each case is a question for the jury (*a*), then the fact that the servant knew of it would be some evidence of actaul knowledge on the part of the master (*b*). Nor is it necessary in order to charge a person for injuries caused by a savage dog, that he should be the owner; it is sufficient if he keeps it; and by harbouring the animal about the premises or allowing it to resort there, he sufficiently keeps it to render himself liable (*c*). The alternative orders mentioned in s. 2 of the Dogs Act, 1871, which provides that "the Court may make an order directing the dog" (if found in fact to be dangerous) "to be kept by the owner under proper control or destroyed," are purely permissive and not obligatory upon the Court. Consequently justices have jurisdiction to order a dangerous dog to be destroyed without giving the owner the option of keeping it under control (*d*).

How long an owner of an animal, known by him to be likely to do damage, remains liable for injuries committed by it after it has escaped from his possession has never been determined. It is suggested in the Institutes (*e*) that the liability would cease with the loss of possession. "*Si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desiit dominus esse ubi fera evasit.*" There is no authority, however, for any such limitation in our law, and the true rule would seem to be, that the owner's liability continues until some other person has assumed the *dominium* of the animal, and has also become aware of its dangerous propensities, at which point the liability for future accidents will be transferred to the new *dominus*. It is even doubtful whether, where the owner of an animal which he knows to be savage sells it without disclosing that fact, his liability would not continue until the purchaser becomes aware of it, on the same principle as that upon which a person is held liable who knowing a gun to be loaded puts it into the

(*a*) *Per* Lord Coleridge, *Applebee* v. *Percy*, (1874) L. R. 9 C. P. p. 658.

(*b*) *Applebee* v. *Percy*, (1874) L. R. 9 C. P. 647.

(*c*) *M'Kone* v. *Wood*, (1831) 5 C. & P. 1

(*d*) *Rex* v. *Dymock*, (1901) 49 W. R 618.

(*e*) Bk. iv. tit. 9.

hands of a person who does not know it, whereby an accident happens (*a*).

Exceptions to general liability.

Although in all the above-mentioned cases of non-natural user of land, removal of support, and keeping of beasts, such acts of user, removal, or keeping, are *primâ facie* done by the doer at his peril, in the sense that his liability is independent of any question of negligence, yet it is not absolute, and in answer to an action for damage arising from such acts it will be open to him to set up by way of defence that the proximate cause of the damage was either what is usually termed the act of God, or the act of foreign enemies, or some other kind of *vis major*, in respect of which he has no remedy over.

Act of God.

An accident is said to be the result of the act of God when "it is due to natural causes directly and exclusively, without human intervention, and such that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected" (*b*). In the first place the term act of God is strictly limited to those classes of inevitable accidents "which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause" (*c*), such as storms or floods; it does not include the spread of fire, except where the origin of the fire was due to lightning (*d*). Secondly, if the particular natural disturbance is such that its occurrence might reasonably have been foreseen, the prevention of the injurious consequences flowing from it must have been practically impossible; it is not essential that it should have been physically impossible to prevent them, it will be sufficient if the precautions necessary for that purpose would under the circumstances of the case have been unreasonable (*e*). Or, thirdly, if the means necessary to ward off the effects of the particular act of nature would not have been unreasonable, then its occurrence must have been so improbable that it could not reasonably have been foreseen. "The mere fact that a phenomenon has happened once, when

(*a*) *Dixon* v. *Bell*, (1816) 5 M. & S. 198; and see *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A. See below, pp. 464, *sqq*.

(*b*) *Per* Mellish, L.J., *Nugent* v. *Smith*, (1876) 1 C. P. D. p. 444.

(*c*) *Per* Cockburn, C.J., *Nugent* v *Smith*, (1876) 1 C. P. D. p. 434.

(*d*) *Forward* v. *Pittard*, (1785) 1 T. R. 27.

(*e*) *Nichols* v. *Marsland*, (1875–6) 2 Ex D. 1.

it does not carry with it or import any probability of a recurrence, when in other words it does not imply any law from which its recurrence can be inferred, does not place that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within the rule it is not necessary that it should be unique, that it should happen for the first time. It is enough that it is extraordinary, and such as could not be reasonably anticipated " (*a*).

It has been doubted whether the exception of the act of God applies to the case of keeping a wild beast, whether for example, a man who kept a tiger would not be liable if lightning broke its chain and it got loose and did mischief (*b*); but it is to be observed that there is nothing wrong *per se* in keeping a wild beast. " A man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens " (*c*). If the keeping of a thing be in fact *per se* wrongful, as where explosives are kept in breach of the regulations of the Explosives Act, the act of God would probably be no defence.

Foreign enemies.

It seems to be generally admitted that the act of foreign or as they are generally termed " King's enemies " will equally with the act of God excuse a breach of a duty imposed by law (*d*). The ground upon which the exception of King's enemies rests seems to be that there is no remedy over against them. In the leading case on this subject it is laid down generally that " where the law creates a duty or charge, and the party is disabled to perform it without any default in him, *and hath no remedy over*, there the law will excuse him " (*e*). For the acts of war committed by the subjects of a state at war with this country there is no remedy over, such acts not being tortious. According to Story (*f*),

(*a*) *Per* Fry, J., *Nitro-Phosphate, &c., Co.* v. *London, &c., Dock*, (1878) 9 Ch. D. p. 515.

(*b*) *Per* Bramwell, B., *Nichols* v. *Marsland*, (1875) L. R. 10 Ex. p. 260.

(*c*) *Per* Platt, B. *Jackson* v. *Smithson*, (1846) 15 M. & W. p. 565.

(*d*) *Rivers Wear Commissioners* v. *Adamson*, (1876) 1 Q. B. D. 546; 2 App. Cas. 743. For definition of " King's enemies," see *Russell* v. *Niemann*, (1864) 17 C. B. N. S., Byles, J., at p. 174.

(*e*) *Paradine* v. *Jane*, (1647) Aleyn. p. 27; and see *Miller* v. *Law Accident Insurance Co.*, (1902) 71 L. J. K. B. 557.

(*f*) Story on " Bailments," s. 526.

pirates on the high seas come within the definition of King's enemies," but this statement is of doubtful acceptation in English law.

It has, however, been decided that a British subject by adhering to the King's enemies, and taking out letters of naturalisation in a foreign country, after the country of adoption is at war with Great Britain, is guilty of high treason (*a*).

Acts of third parties who are not foreign enemies afford no excuse.

But for acts committed by any third persons not coming under the head of foreign enemies, however uncontrollable such acts may be, the author of a nuisance is probably not excused. On this principle it has been laid down with reference to the analogous duty of a gaoler to keep his prisoner safe at all hazards, that "if traitors break a prison it shall not discharge the gaoler, otherwise if the King's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other not" (*b*). However irresistible a mob of rioters who carry off a prisoner may be, their acts afford no defence to the gaoler in an action for an escape (*c*). In an old case in the Year Book (*d*), it was ruled by Brian, C.J., that where the defendant placed his cattle on a common and the cattle were driven thereout on to the land of the plaintiff by the dogs of a third party, although under such circumstances as to give a cause of action to the defendant against the owner of the dogs, that fact afforded no excuse to the defendant. So too it has been held that one who is under a prescriptive liability to repair a fence, is bound absolutely, except in the case of damage by the act of God (*e*), to have a proper fence at all times, and that if a third party breaks down the fence, and before notice thereof, to the servient owner damage ensues to the adjoining owner from want of a proper fence, the servient owner will not be excused, for the prescriptive obligation to repair the fence

(*a*) *Rex* v. *Lynch*, (1903) 1 K. B. 444.

(*b*) *Southcote's case*, (1600) 4 Rep. 84 a.

(*c*) *O'Neil* v. *Marson*, (1771) 5 Burr. 2813; *Elliott* v. *Duke of Norfolk*, (1792) 4 T. R. 789.

(*d*) 20 Edw. IV. 11, pl. 10. See too *Bell* v. *Twentyman*, (1841) 1 Q. B. 766.

(*e*) In the case here referred to (see (1873) L. R. 8 Q. B. p. 278) the Court indeed used the expression "act of God, *or vis major*," but what they understood by the latter limb is not clear. Probably they treated the term *vis major* as synonymous with act of God, though possibly they may have intended to refer to foreign enemies.

"subjects him to all risks of injury that may be done to it by strangers or trespassers" (*a*). There are, however, on the other hand certain *dicta* to the effect that the acts of third parties, although not foreign enemies, may, if uncontrollable, be regarded as *vis major*, and consequently, will operate as a defence. Thus in *Nichols* v. *Marsland*, Bramwell, B., speaking of the liability of the owner of a reservoir for water escaping from it says "Suppose a stranger let it loose would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be" (*b*). And this view no doubt is much the more satisfactory of the two, for the remedy which the defendant has over against the third party must in many cases be theoretical only, as where the damage is done by a mob of penniless rioters, but the authorities above cited to the contrary effect seem too strong to be got over.

Vis major where no remedy over.

The exemption from liability for the breach of any duty imposed by law, unlike the implied exception from the common law liability of a common carrier, is not limited to the act of God and the King's enemies, but includes any other species of *vis major* or inevitable accident in respect of which the defendant has no remedy over. Thus, where the plaintiff hired of the defendant the ground floor of a warehouse of which the latter occupied the upper floor, the rain water from the roof of which was collected by gutters into a box, and a rat gnawed a hole in the box, whereby the rain water without any negligence in the defendant flowed down through the hole and flooded the plaintiff's premises, the defendant was held not liable, one of the grounds of the decision being that the accident amounted to *vis major* (*c*). And again in *Walker* v. *British Guarantee*

(*a*) *Lawrence* v. *Jenkins*, (1873) L. R. 8 Q. B. 274. In one view of prescription, a prescriptive duty is a contractual duty rather than one imposed by law, but it is apprehended that this makes no difference as regards the limitation to be put on the extent of that duty, the terms of the supposed contract upon which the duty rests being left to the law to imply.

(*b*) (1875) L. R. 10 Ex. p. 259; *Ely Brewery Co.* v. *Pontypridd Urban Dist. Council*, (1904) 68 J. P. 3, C. A. See, too, the judgment of Kelly, C.B., in *Box* v. *Jubb*, (1879) 4 Ex. D. p. 79, where, however, there was nothing to show that the offending water was the defendant's water.

(*c*) *Carstairs* v. *Taylor*, (1871) L. R. 6 Ex. 217. But damage done by rats

Association (*a*), a plea by a treasurer, that before he could pay over certain moneys received by him to the bankers of the association, he was, "without any default or negligence or want of due care on his part, robbed by violence of the whole of the said moneys"; was held by the Court to exonerate alike the defendant and his sureties from liability.

3. In all cases of physical injury arising from the use of property not coming under the heads already dealt with (*b*), the defendant will be liable if the injury be wilful (*c*) or caused by his negligence, but not otherwise.

NEGLIGENCE.

Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea, and has nothing to do with a state of mind. Being a mere negation, it is not the subject of degree, and the expression "gross negligence" has been condemned as amounting to nothing more than ordinary negligence "with the addition of a vituperative epithet" (*d*). Thus, if one of two persons, of whom the same degree of care is required, fails by the slightest degree to take the required amount of care, while the other takes no care at all, the latter is not more negligent than the former; the negligence of both is precisely the same.

Degrees of care.

But though there are no degrees of negligence, negligence being in all cases the same thing, namely, the absence of due care, there are undoubtedly degrees of care, a greater degree of care being due under one set of circumstances than under another; and the expression gross negligence, though inaccurate and possibly misleading, is a convenient phrase to express the idea that the degree of care required of the defendant was small (*e*). These degrees of care, however, it is impossible to define or

is in general no defence to an action on the contract of carriage (see *Dale* v. *Hall*, (1750) 1 Wils. 281; *Laveroni* v. *Drury*, (1852) 8 Ex. 166; *Kay* v. *Wheeler*, (1867) L. R. 2 C. P. 302), for it does not amount to the act of God.

(*a*) (1852) 18 Q. B. 277.

(*b*) Injuries arising from the use of land, or the keeping of beasts, fire, or explosives.

(*c*) As to the meaning of the term "wilful," see above, pp. 7, 8.

(*d*) *Per* Rolfe, B., *Wilson* v. *Brett* (1843) 11 M. & W. p. 116; and *per* Willes, J., *Grill* v. *General Iron Screw Colliery Co.*, (1866) L. R. 1 C. P. p. 612.

(*e*) See *per* Lord Chelmsford, *Giblin* v. *M'Mullen*, (1868) L. R. 2 P. C. p. 337.

classify, for they are infinite in number, each special set of circumstances requiring its own particular degree; so that an exhaustive catalogue of the various degrees of care would be a simple enumeration of all the decided cases. It is in each case practically a question of fact for the jury, whether the proper degree of care has been taken—the jury being guided by considerations of what a reasonable and prudent man would have done under the circumstances (*a*).

Where, however, by the relationship existing between two parties a special duty to take care is either actually, or by implication, laid upon one of them, a breach of that duty, by the person from whom it is required, will render him liable in damages for any injury immediately resulting from such negligence (*b*).

Liability of boarding-house keeper for loss of boarder's goods.

Thus, to take a concrete example, the defendant was held liable in the recent case of *Scarborough and Wife* v. *Cosgrove* (*c*), in which the plaintiff (who was staying as a guest at a boarding house), having locked up some valuables in a satchel placed the case in an unlocked drawer in her chamber, from whence it was stolen by another guest. The Court of Appeal ruling (*d*) that, a person who "carries on the business of a boarding house keeper for reward is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty the luggage of the guest is lost the boarding house keeper is liable for the loss to the guest."

Requirement of skill.

As no prudent person, unless possessed of competent skill, would undertake the doing of any act which in the absence of skill would cause great risk of injury to others, the doing of such acts by an unskilled person will amount to negligence. It is negligence in a person not skilled in the management of horses to ride or drive in a crowded thoroughfare (*e*). If a person is

(*a*) See above, pp. 13, 14, for definition of negligence given by Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. p. 784.

(*b*) *Phipps* v. *New Claridge's Hotel, Ltd.*, (1905) 22 T. L. R. 49.

(*c*) (1905) 74 L. J. K. B. 892.

(*d*) (1905) 74 L. J. K. B. 892. Romer, L.J., at p. 898.

(*e*) *Hammack* v. *White*, (1862) 11 C. B. N. S. 588.

"driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill" (*a*). So too with the management of a railway train (*b*), or a ship, or machinery; in all such cases negligence includes want of competent skill.

And in the case of a professional person, or tradesman, or artificer, actually pursuing a profession or vocation which demands special knowledge, there is a presumption raised, amounting to an implied warranty in law, that such person is possessed of reasonably competent skill in the exercise of his particular calling (*c*).

Setting chattels in motion.

Foremost among the class of cases in which, in the absence of wilfulness, negligence is an essential ingredient in liability, come cases of injury caused by chattels which, having been set in motion by the defendant, have come into collision with the plaintiff or his property. A street accident affords a familiar instance of liability of this kind. A person who has been run over by a carriage cannot recover against the owner unless the party in charge of the carriage was guilty of negligence in its management or of wilful misconduct (*d*). The most usual forms of negligence in the management of a vehicle are those of driving at an improper speed, or of driving on the wrong side of the road. The question of what speed is improper is of course one of degree, and one which is to some extent relative to the particular place and the extent to which it is frequented. Though being on the wrong side of the road is in general some evidence of negligence, it is slight evidence only, for the rule of the road is not by any means inflexible. A person driving a carriage is not bound to keep on the regular side of the road, but if he does not do so he is bound to exercise more care and keep a better look-out to avoid a collision than would be requisite if he were to confine himself to the proper side (*e*). Moreover, if a collision can be better avoided by going on the wrong side, it is not merely

Collisions by vehicles on land.

(*a*) *Per cur.*, *Hutchinson* v. *York*, *Newcastle*, *&c.*, *R. Co.*, (1850) 5 Ex. p. 350.

(*b*) *Hutchinson* v. *York*, *Newcastle*, *&c.*, *R. Co.*, (1850) 5 Ex. 343.

(*c*) For a recent discussion on this question, see *Love* v. *Mack*, (1905) 92 L. T. 345; and Wyatt Paine on Bailments, p. 166 *sqq*.

(*d*) *Holmes* v. *Mather*, (1875) L. R. 10 Ex. 261.

(*e*) *Pluckwell* v. *Wilson*, (1832) 5 C. & P. 375.

justifiable to do so but obligatory (*a*). The rule of the road, such as it is, applies as well to saddle-horses as to carriages (*b*). It is the duty of a person driving over a crossing for foot-passengers at the entrance to a street to drive slowly and with caution (*c*). Pulling the wrong rein is evidence of negligence (*d*), so too is the spurring of a horse when it is within kicking distance of a passer-by (*e*). Again, it is evidence of negligence to leave a horse and cart unattended in the street, whereby accidents may occur from the horse moving on (*f*). The owner of a cart is bound to provide it with proper and sufficient tackle, and he is negligent if he does not; therefore where in consequence of a chain-stay of the defendant's cart breaking, the horse ran away and did damage, the defendant was held liable (*g*). But the mere fact of trying a riding-horse whose temper is unknown to the rider in a frequented thoroughfare is no evidence of negligence (*h*), nor is it such evidence to try carriage-horses in harness for the first time in a similar place (*i*). Nor does the mere unexplained bolting of a horse afford any evidence of negligence on the part of the person in charge of it (*k*). It is not negligence to drive cattle through the street of a town loose instead of leading them with halters (*l*).

Collisions by ships.

As with collisions between carriages, &c., on land so with collisions between ships at sea; in the absence of proof of negligence or wilful misconduct (*m*) the owner of a ship which runs into

(*a*) *Clay* v. *Wood*, (1803) 5 Esp. 44.

(*b*) *Turley* v. *Thomas*, (1837) 8 C. & P. 103.

(*c*) *Williams* v. *Richards*, (1852) 3 C. & K. 81.

(*d*) *Wakeman* v. *Robinson*, (1823) 1 Bing. 213.

(*e*) *North* v. *Smith*, (1861) 10 C. B. N. S. 572.

(*f*) *Snee* v. *Durkie*, (1903) 6 F. 42 Ct. of Sess.; *Illidge* v. *Goodwin*, (1831) 5 C. & P. 190. The common practice is to speak of certain kinds of acts as negligent acts, and not merely as evidence of negligence, but it is apprehended that negligence can never be predicated of an act as matter of law, the character of the act being in each case a question for the jury. Even though the inference of want of due care be irresistible, still the judge cannot withdraw the question of negligence from the jury, and if the jury choose perversely to find that there was no negligence, the only remedy is an application to the Court of Appeal; see below, pp. 511—513.

(*g*) *Welsh* v. *Lawrence*, (1818) 2 Chit. 262.

(*h*) *Hammack* v. *White*, (1862) 11 C. B. N. S. 588.

(*i*) *Holmes* v. *Mather*, (1875) L. R. 10 Ex. 261. The earlier case of *Michael* v. *Alestree*, (1676) 2 Lev. 172, must be treated as overruled.

(*k*) *Hammack* v. *White*, *supra*; *Manzoni* v. *Douglas*, (1880) 6 Q. B. D. 145.

(*l*) *Tillett* v. *Ward*, (1882) 10 Q. B. D. 17.

(*m*) As to what constitutes negligence and misconduct in recent cases see

another cannot by the common law be held responsible. The fact that the collision was due to inevitable accident, as where it occurred solely from the darkness of the night and inability to see the other ship's lights (*a*), or from the density of the fog (*b*), will excuse. Where it is the duty of a ship under the regulations for preventing collisions at sea (*c*), to keep out of the way of another, but she is unable to do so by reason of her having been disabled in a former collision, and the other ship being unaware of her disabled condition keeps her course, if a collision ensues the former will be excused on the ground of inevitable accident (*d*), unless, indeed, the earlier collision was due to her own default, in which case, it may be that her disabled condition will afford no defence, on the same principle as that on which a defendant is not allowed to plead his own intoxication. There are cases, however, in which the mere fact of the collision raises a *prima facie* presumption of negligence, as where a vessel is run down while at anchor (*e*) ; in such case "the vessel under weigh is bound to show by clear and indisputable evidence that the accident did not arise from any fault or negligence on her part ; and for this obvious reason, that a vessel lying at anchor has no means of shifting her position or escaping the collision" (*f*). So, also, where one vessel is lying to, the burden of proof is on the other having the wind free, to show how she came into contact (*g*).

Firing guns.

Another familiar instance of the setting of a chattel in motion is the firing of a gun ; if the defendant is guilty of negligence in the firing of it he will be answerable, but otherwise not, unless he fired at the plaintiff wilfully (*h*). What constitutes negligence in firing will necessarily be relative to the time and place. "If a

Greenock Steamship Co. v. *Maritime Insurance Co.*, (1903) 2 K. B. 657, C. A. (Negligence of Master) ; *The Challenge & The Duc d'Aumale*, (1905) 74 L. J. P. 55. (Fog, tug towing another vessel) ; *The Britannia*, (1905) P. 98 ; *The General Havelock*, (1905) 21 T. L. R. 438 ; *The Circe*, (1905) 21 T. L. R. 525. Collision both ships to blame.

(*a*) *The Shannon*, (1842) 1 W. Rob. 463.

(*b*) *The Marpesia*, (1872) L. R. 4 P. C. 212.

(*c*) Made by Order in Council under the Merchant Shipping Act, 1894.

(*d*) *The Aimo*, (1873) 2 Mar. Law Cas. (Aspinall) N. S. 96.

(*e*) *The Bothnia*, (1860) Lush. 52 ; *The Merchant Prince*, (1892) P. 9 ; *The Mediana*, (1899) P. 127.

(*f*) *Per* Dr. Lushington, *The Batavier* (1845) 2 W. Rob. p. 407 ; see *The Indus*, (1886) 12 P. D. 46.

(*g*) *The Eleanor*, (1865) 2 Mar. Law. Cas. O. S. 240.

(*h*) *Stanley* v. *Powell*, (1891) 1 Q. B. 86. And see above, p. 8.

man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots" (*a*).

Launching vessels.

Another instance is that of launching a vessel. "The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such notice as is reasonable and sufficient to prevent any injury happening from the launch" (*b*). And where, as in the Mersey, it is usual to have a tug in attendance decorated with flags, to indicate that a launch is imminent, no less precaution will be sufficient (*c*).

Lowering and raising bales of goods.

So, again, those who are engaged in lowering or raising bales of goods above a spot where others are likely to be passing by, have a duty cast upon them to take reasonable care; and this is equally so whether the spot in question be a public highway (*d*) where all members of the public have a right to go, or private property where no person has a right to be without the permission of the owner (*e*), provided it be a place where the defendant has reason to expect that others may be passing at the time (*f*).

Duty towards trespassers.

This duty to take care not to cause physical injury by the setting of a chattel in motion is a duty which is owed towards all persons, even to those who are wrongfully in the place where the accident happens (*g*). If a man wrongfully leaves his property lying in the middle of the high road that will not excuse another for negligently driving over it (*h*). If persons trespass in a wood where the owner happens to be shooting at the time, the fact of their being trespassers will not relieve him of the obligation to take care not to shoot in the direction where he knows them to be passing. The driver of a train is bound to take care not to run over a person who is trespassing on the

(*a*) *Per* Blackburn, J., *Smith* v. *London & South-Western R. Co.*, (1870) L. R. 6 C. P. p. 22.

(*b*) *Per* Sir R. Phillimore, *The Andalusian*, (1877) 2 P. D. p. 233.

(*c*) *The George Roper*, (1883) 8 P. D. 119.

(*d*) *Byrne* v. *Bodle*, (1863) 2 H. & C. 722.

(*e*) *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596.

(*f*) *Batchelor* v. *Fortescue*, (1883) 11 Q. B. D. 474.

(*g*) For standard of care and skill required in avoiding damage to property of trespasser, see *Petrie* v. *Rostrevor Owners*, (1898) 2 Ir. R. 556, C. A.

(*h*) *Davies* v. *Mann*, (1842) 10 M. & W. 546: *Mayor of Colchester* v. *Brooke*, (1845) 7 Q. B. 339.

line; and by parity of reasoning a railway company by whose negligence a collision has occurred will probably be liable for injury caused to a passenger in the colliding train whom they know to be there, none the less because his presence there is a trespass by reason of his having fraudulently travelled without a ticket. The mere fact that a man obtains admission into a train as a passenger on the fraudulent pretence that he is a season ticket-holder when he is not, will, it is conceived, not relieve the company from responsibility towards him for negligent acts of misfeasance. It will not make him *caput lupinum*. In one case (*a*), indeed, Blackburn, J., suggested that where the passenger has omitted to take a ticket, not by accident but from fraud, even though the company know him to be in the train, there is no duty on them to carry him safely, but this *dictum* must probably be understood as limited to accidents arising from defects in the plant, premises, or permanent way, liability in respect of which cannot arise independently of the contract of carriage, and not as extending to acts of commission such as that of dashing the train in which he is against some obstructing body (*b*). No doubt the fact of the plaintiff being a trespasser will materially affect the question whether the defendant has been guilty of a want of care, for the setting of a chattel in motion in a place where no person is likely to be does not argue any want of care (*c*), and *prima facie* persons are not likely to be in a place where they have no right to go; but if the defendant knows that persons are likely to be passing through the *locus in quo* he is equally bound to take care whether those persons are rightfully so passing or not.

What is a setting in motion.

To render a person liable for damage caused by the setting of a chattel in motion it is not necessary that he should have

(*a*) *Austin* v. *Great Western R. Co.*, (1867) L. R. 2 Q. B. p. 446.

(*b*) As to this distinction between misfeasance and nonfeasance, see *Taylor* v. *Manchester, &c., R. Co.*, (1895) 1 Q. B. 134. The judgment of Thesiger, L.J., in *Foulkes* v. *Metropolitan District R. Co.*, (1879–80) 5 C. P. D. p. 170), where he refused to recognise any distinction "between the commission of an act which is in itself wrongful, and the omission of some act to which the company would admittedly be bound if the passenger were carried by them under a contract," must be regarded as overruled by that case. As to what amounts to a misfeasance, see *Kelly* v. *Metropolitan R. Co.*, (1895) 1 Q. B. 944.

(*c*) *Batchelor* v. *Fortescue*, (1883) 11 Q. B. D. 474.

directly done the act himself which set it in motion, or authorised the doing of it by another; it is enough if, the thing in question being of an unstable character and liable readily to be set in motion, such as the contents of a loaded gun, or an unattended horse and cart, has been negligently left in a place where he knows it to be extremely probable that some other person will set it in motion (*a*). Therefore where the defendant sent a young girl to fetch a loaded gun and she in play pointed it at the plaintiff, drew the trigger and wounded him, the defendant was held liable (*b*). In *Williams* v. *Eady* (*c*), the defendant, a schoolmaster, allowed a bottle containing a stick of phosphorus to be lying about in his conservatory to which the pupils had access, and one of the pupils, finding the bottle, played with it, with the result that it exploded and injured the plaintiff, a fellow pupil: on a finding by the jury that the defendant was negligent in so leaving the bottle lying about where the boys could get at it, he was held liable. It has indeed been said, that a man is liable if he negligently leaves his horse and cart unattended in the street and a passer-by whips the horse and causes it to move on and a collision ensues (*d*). In a recent case it was held that the mere fact of a horse (harnessed to a cart) running away in the day time was *primâ facie* evidence of negligence in its owner (*e*). In order, however, for liability to accrue for the results of negligence by relation, it is apparently essential, that the neglect with regard to the particular duty should be in itself the effective cause of the accident. Thus in *McDowall* v. *Great Western Ry.*(*f*) (in which trucks, with the brakes screwed down, were left unguarded on an incline plane), it was held, by the Court of Appeal, that the defendants were not liable for an accident, caused by trespassers releasing the brakes and setting the trucks in motion, although they were aware that boys were in the habit of trespassing on the siding and meddling with the trucks. It is, however, submitted that the principle governing

(*a*) See *per* Lord Denman, C.J., *Lynch* v. *Nurdin*, (1841) 1 Q. B. p. 35; and see *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A.

(*b*) *Dixon* v. *Bell*, (1816) 5 M. & S. 198.

(*c*) (1893) 10 Times L. R. 41.

(*d*) *Illidge* v. *Goodwin*, (1831) 5 C. & P. 190. But see above, pp, 146, 147.

(*e*) *Snee* v. *Durkie*, (1903) 6 F. 42, Ct. of Sess.

(*f*) (1903) 2 K. B. 331; and see *Caledonian R. Co.* v. *Mulholland*, (1898), A. C. 216.

this decision is not one that should be extended (*a*). In a recent case (*b*) in which owing to the nature of the accident (an explosion) the immediate cause of the disaster was unascertainable it was held by the Privy Council that evidence of negligence on the part of the defendants in failing to supply suitable machinery and take proper precautions (thus probably conducing to the result) was relevant to the issue, and rendered them liable to the plaintiff.

Negligent creation of source of danger

A second class of cases in which a person will be liable for negligently causing physical injury to another, consists of those in which he has negligently created a source of danger into contact with which the plaintiff has lawfully come and so coming has injured himself. In some such cases the defendant may not be aware that he has created any source of danger at all, as where a chemist by mistake compounds a medicine with the wrong drugs, in which cases the negligence may be said to consist in bringing the dangerous thing into existence. In other cases he may know of the existence of the source of danger but forget to give due warning of it, as where persons engaged in repairing a road omit to place lanterns upon the spot at night to indicate that the road is up, or where the consignor of a carboy of nitric acid neglects to give the carrier notice of the dangerous character of the parcel, in which cases the negligence consists in the omission to give due warning (*c*).

Towards whom the duty to take care exists.

For the purposes of a civil action, however, there is no such thing as negligence in the abstract; actionable negligence consists in the neglect of the use of care towards a person towards whom the defendant owes the duty of observing care; and in actions for negligence of the class now under discussion the difficulty of fixing the defendant with liability arises mainly in connection with the question whether the defendant owed any such duty as towards the plaintiff. But it has been laid down as a proposition to be deduced from the authorities that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did

(*a*) See *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A..

(*b*) *Mc Arthur* v. *Dominion Cartridge Co.*, (1905) A. C. 74.

(*c*) As to the negligent communication of infectious diseases, see below, pp. 492 *sqq*.

think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (*a*). Consequently when the dangerous state of things consists of an obstruction upon a high road, the duty to take care that injury shall not result therefrom is a duty which is owed towards all members of the public, for all persons have a right to pass along the high road (*b*).

Duty towards person to whom goods are supplied for use.

"Whenever one person supplies goods or machinery or the like for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of inqury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing" (*c*).

An interesting exemplification of the principle is to be found in the case of *Chapronier* v. *Mason* (*d*), in which the plaintiff brought an action against the defendant (a confectioner) for

(*a*) *Per* Brett, M.R., *Heaven* v. *Pender*, (1883) 11 Q. B. D. p. 509. The proposition so stated appears to be somewhat too wide, for it would include cases of damage caused by a natural user of land. But it was evidently intended to be read in connection with the class of cases now being discussed, where by reason or some act of omission of the defendant, the plaintiff has been caused to injure himself. The majority of the Court of Appeal in *Heaven* v. *Pender*, (1883) 11 Q. B. D. 503, though not expressly dissenting from the rule so stated by Brett, M.R., thought that the facts of that case did not render it necessary to lay down so wide a proposition. They preferred to rest their judgment upon another ground, as to which see below, p. 489. In the subsequent case, however, of *Thrussell* v. *Handyside*, (1888) 20 Q. B. D. p. 363, the proposition of Brett, M.R., received the approval of Hawkins, J., who said that in his opinion it was "a correct statement of the law." In the still later case of *Le Lievre* v. *Gould*, (1893) 1 Q. B. p. 497, Lord Esher himself offers an explanation of the effect of *Heaven* v. *Pender*, in which he apparently treats the injury in that case as having been due to a misfeasance analogous to that of reckless driving along a high road. In such a description it is difficult to recognise *Heaven* v. *Pender*, as to the facts of which case see below, pp. 472, 473. It is submitted that the Master of the Rolls' original judgment is to be preferred to his explanation.

(*b*) *Shoreditch Corporation* v. *Bull*, (1904) 20 T. L. R. 254, H. L.

(*c*) *Per* Brett, M.R., *Heaven* v. *Pender*, (1883) 11 Q. B. D. p. 510.

(*d*) (1905) 21 T. L. R. 633; see also *Frost* v. *Aylesbury Dairy Co.*, (1905) 1 K. B. 608, C. A.

injuries caused to his teeth and mouth by a stone in a bath bun which he had purchased at the defendant's shop. Plaintiff's case was that the presence of the stone in the bun was due to negligence, and that, as there was an implied warranty in the article sold, the defendant was liable to pay him compensation. At the trial the jury found, in answer to questions left to them by the judge, that there was no negligence on the part of the defendant or his servants in the manufacture of the Bath bun, that the bun was reasonably fit for the purposes of being eaten in the usual way, that the bun was of merchantable quality, and that the amount of damage the plaintiff sustained by reason of the presence of the stone in the bun, in case it was a question of damages, was 5*l*. On these findings judgment was entered for the defendant. Upon the plaintiff appealing on the ground that the findings of the jury were against the weight of evidence, their Lordships held that the plaintiff had made out a primâ facie case of negligence, that the Judge in the court below had misdirected the jury, and that the case must go down for a new trial.

Duty towards persons to whom goods are delivered for purposes of carriage.

So, too, "a person who gives another goods to carry, goods which require more care and caution than ordinary merchandise, and which are likely, in the absence of such caution, to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice" (*a*). Thus, where the defendants packed chloride of lime in casks and delivered the casks to the plaintiffs for shipment without disclosing the dangerous character of the contents, and the plaintiffs stowed the casks in the hold of their vessel where the lime did mischief, the defendants were held responsible (*b*). In such a case, no doubt, where the question is between two parties to a contract, such as consignor and carrier or vendor and purchaser, there is a contractual duty to take care arising out of the implied terms of the contract of carriage or sale as the case may be, but there is also a concurrent duty independent of contract. "The existence of a contract between

(*a*) *Per* Willes, J., *Farrant* v. *Barnes*, (1862) 11 C. B. N. S. p. 563.

(*b*) *Brass* v. *Maitland*, (1856) 6 E. & B. 470.

two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made" (*a*).

Limits of duty.

Where goods are supplied or delivered by one person to another to be used, carried, or otherwise dealt with, the existence of a duty in the former to take care that injury shall not ensue from their being dealt with in the manner intended, is, as above stated, confined to cases in which they are supplied or delivered "under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill," there will be danger of injury to the person for whose use the thing is supplied. The first question then to be determined is, what are those circumstances? They would seem to fall under three classes:—1. Where the goods are supplied under a contract for consideration. 2. Where the person supplying them is known to have such superior knowledge or skill in relation to the subject-matter that the other party is likely to rely on such knowledge or skill having been used. 3. Where the party supplying them knows of some hidden source of danger connected with them.

Where the goods are delivered under a contract, in the sense that a consideration passes to the party delivering them, as where they are sold, or delivered for purposes of carriage, it will undoubtedly be reasonable for the party receiving them to assume that care has been taken, and a duty to the other to take care will consequently arise. But the existence of a contract, in the sense of the passing of a consideration, is presumably not essential to the creation of such a duty. For instance, if a chemist gratuitously compounds a medicine for a friend, he must know that the other, if ignorant of the nature of drugs, will rely upon his taking care not to use wrong drugs, which reliance will presumably give rise to a duty to take care and render him liable for any damage that may result from his carelessness. Where a thing is gratuitously given or lent by one person to another it is the duty of the lender "to communicate to the borrower defects in the article lent of which he is aware, and if either deliberately

(*a*) *Per* Brett, M.R., *Heaven* v. *Pender*, (1883) 11 Q. B. D. 503; *supra* p. 466

or by gross negligence he does not discharge this duty, he is liable for injury resulting to the borrower" (*a*). If, however, the thing is of such a character that the one party has as good means of judging of its condition as the other, it would be unreasonable for the gratuitous recipient to rely upon care having been taken; he ought to examine the thing for himself. There will consequently in such a case be no duty in the donor or lender to take care. Thus, where the defendant gratuitously lent to the plaintiff a scaffold a portion of which was rotten, and the plaintiff while using the scaffold fell and was injured in consequence of the rotten portion giving way, it was held that the defendant, not having had actual knowledge of the defect, was not responsible, notwithstanding that in the opinion of the jury he might have discovered it by the exercise of ordinary care (*b*). Similarly, where a gratuitous licence is given to a person to go upon and use premises of the licensor, it would be unreasonable in him to rely upon the licensor having taken care to have the premises in a safe condition, for if he keeps his eyes open he can form as good an opinion himself as can the owner (*c*). Though where an invitation to enter upon premises for the purpose of viewing them is given by a landlord or his agent to a prospective tenant, there is a duty laid upon the licensor to see that the premises are reasonably safe, or at all events free from concealed danger (*d*). And where, as in the case of the chemist put above, the plaintiff's means of forming an opinion as to the condition of the thing supplied are, to the knowledge of both parties, so inferior to those of the defendant that it may fairly be assumed *à priori* that the plaintiff will trust entirely to the defendant's judgment, then a duty to take care must arise, and none the less because the case is one of gift or gratuitous loan. And with regard to the third class of cases, there is ample authority that the party supplying the goods is bound to take care to disclose any hidden

(*a*) *Coughlin* v. *Gillison*, (1899) 1 Q. B. 145; Collins, L.J., at p. 149, C. A.

(*b*) *Macarthy* v. *Young*, (1861) 6 H. & N. 329. This judgment indeed lays it down that a gratuitous lender is never bound to take any care, but that proposition is wider than the facts of the case demanded, and in the light of other decisions is obviously incorrect.

(*c*) See *Ivay* v. *Hedges*, (1882) 9 Q. B. D. 80.

(*d*) *Wright* v. *Leferer*, (1903) 51 W. R. 149, C. A.; and see *Harris* v. *Perry*, (1903) 2 K. B. 219.

defects which are known to him, and which may make the use of the goods perilous, even though they be supplied gratuitously (*a*).

Implied warranties.

Nor does this duty to take care apply exclusively to cases where the defect is known to one party and is not known to the other. When a trader supplies an article of general requirement which the ordinary experience of mankind shows will be used by the purchaser in a particular way, the trader impliedly warrants that it is fit for that particular use, and if by reason of a breach of this implied warranty the user suffers loss or injury, the trader is liable for such damage.

Frost v. *Aylesbury Dairy Co.*

Thus in the case of *Frost* v. *The Aylesbury Dairy Co.* (*b*), in which the plaintiff sued the defendants for damages sustained by him by reason of the death of his wife from typhoid fever contracted through drinking impure milk supplied by the company. It was held that the plaintiff was entitled to recover. The circumstances being such as to show that he relied on the defendants' skill and judgment when purchasing the article from them. And that such reliance raised an implied warranty of fitness, the breach of which rendered the defendants responsible to the plaintiff for the damage which he had sustained.

Duty with respect to goods delivered under a contract exists towards others than the contracting party.

Given that a particular case falls within one or other of those three classes of cases specified above, and that consequently the party supplying the goods owes a duty to the person to whom they were immediately supplied, the next question is whether that duty is confined to that person. It seems that it is not. Even where the goods have been supplied under a contract for consideration, the liability for omission to take care is not confined to the immediate party to the contract. Thus where the defendant, a chemist, carelessly compounded a hairwash of improper and injurious ingredients, and sold it to the plaintiff's husband for the purpose of being used by the plaintiff, and she using it as intended was injured thereby, it was held that the defendant was liable, since there was a duty to take care as towards the plaintiff,

(*a*) *Blakemore* v. *Bristol & Exeter R. Co.*, (1858) 8 E. & B. 1035; *Macarthy* v. *Young*, (1861) 6 H. & N. 329. This is in strist analogy to the rule as to a landlord's duty towards bare licensees, as to which, see below, p. 489.

(*b*) (1905) 1 K. B. 608, C. A.; *Chapronier* v. *Mason*, (1905) 21 T. L. R. 633, C. A. See also *Clarke* v. *Army & Navy Co-operative Society*, (1903) 1 K. B. 155, C. A. And see *Bostock* v. *Nicholson*, (1904) 1 K. B. 725.

although she was not a party to the contract of sale (*a*). In that case, no doubt, the contract was made for the express benefit of the plaintiff, who was expressly mentioned at the time of the sale, but yet the duty for the breach of which she was allowed to recover was not a contractual duty, for it is a well-settled rule of the Common Law that where A. makes a contract with B. for the benefit of C., C. cannot sue upon the contract (*b*). But, further, it is not necessary that the plaintiff should be expressly named at the time of the contract made as one of the persons for whose use the thing in question is supplied, nor that the defendant should contemplate the plaintiff in particular as a person likely to use it. The duty to take care will exist towards all persons to whom the original party to the contract, reasonably relying on care having been taken, may innocently deliver the thing as one fit and proper to be dealt with in the way in which the defendant intended the original contractor to deal with it himself (*d*). Therefore, where the defendant employed one R., a railway carrier, to forward for him by rail a carboy of nitric acid without disclosing to him the dangerous nature of the contents, and R., being unable to forward it by rail to its destination on that particular day, delivered it to the plaintiff, the servant of another carrier, to carry it by road, and the plaintiff, ignorant of the contents of the carboy, carried it on his shoulder from one van to another, and while he was so doing, from some unexplained cause the carboy burst, and the contents flowed over and injured him, the defendant was held liable (*d*), Willes, J., expressly laying it down that a person who, under such circumstances, omitted to give notice of the dangerous character of the article, "would be liable to an action at the suit of *any one* who might be injured by his wrongful omission" (*e*). Where a woman whose child was ill sent a boy to a chemist's shop for some paregoric, and the chemist's apprentice carelessly gave the boy a bottle of laudanum

Duty extends towards all persons likely to be injured by defendant's want of care.

(*a*) *George* v. *Skirington*, (1869) L. R. 5 Ex. 1.

(*b*) *Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393.

(*c*) *Gordon* v. *McHardy*, (1903) 6 F. 210, Ct. of Sess. In this case it is submitted that the plaintiff, though nonsuited in his action against the retailer, would have been entitled to recover damages against the wholesale trader.

(*d*) *Farrant* v. *Barnes*, (1862) 11 C. B. N. S. 553.

(*e*) *Ibid.*, p. 563; and see *Clarke* v. *Army & Navy Co-operative Society*, (1903) 1 K. B. 155, C. A.

with a paregoric label on it, who took it back to the woman, and she administered to the child what would have been a proper dose had the contents been paregoric as she supposed, and the child immediately died from the effects, upon the apprentice being indicted for manslaughter, Bayley, J., directed the jury that if they thought he had been negligent they must convict (*a*). This amounted to a direction that the circumstances created a duty to take care as towards persons who might take or have administered to them the contents of the bottle on the faith of the label being correct, although such persons were no parties to the contract of sale, nor expressly contemplated by the vendor as parties for whose use the purchase was made. From which it follows that for a breach of that duty the child, if, instead of being killed, it had been merely injured in health, would have had an action for damages. The civil consequences of a wrongful act may possibly be wider, but they cannot be less wide than its criminal consequences. And in an American case (*b*), it was held that a manufacturer of drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable in damages to all persons who are injured by using it as such medicine in consequence of the false label, however many intermediate sales it may have passed through before it reached the hands of the person injured. In that case, indeed, the Court expressly rested the defendant's liability on the ground that his act in putting on the wrong label was imminently dangerous to human life; but why liability should, as towards strangers to the contract, be limited to cases in which the negligent act is likely to cause death, and not to be extended to cases in which it is likely to cause injury of other kinds, it is difficult to see. The fact that one kind of article is likely to produce damage of a less degree than another may be a good reason for requiring a less degree of care to be taken, but seems to afford no reason for limiting the class of persons towards whom the duty to take that care is owed (*c*). Where the defendant, a dockowner, under a

(*a*) *Tessymond's case*, (1828) 1 Lewin, C. C. 169.

(*b*) *Thomas* v. *Winchester*, (1852) 6 New York Rep. 397.

(*c*) This principle must obviously apply to all cases of sales of patent medicines or drugs sold ready made up, as distinguished from medicines compounded on the particular occasion according to a special prescription.

contract with the owner of a ship which was being repaired in the dock, supplied and put up outside the ship a staging to enable it to be painted, which staging, owing to the defendant's negligence, was in a defective condition at the time when it was so supplied, and the plaintiff, a workman in the employ of a painter who had contracted with the shipowner to paint the ship, went upon the staging for the purpose of doing the painting, whereupon the staging gave way and he was injured, the defendant was held liable, although at the time of the accident the staging was under the control of the shipowner and not of the defendant (*a*). Again, where the defendant, a charterer (who had received, from the owner, a charter party stating that the ship was in good and fit condition) bargained with a stevedore to load cargo; and one of the stevedore's men (the plaintiff in the action) in order to get down into the main hold, put his foot on the top rung of a fixed iron ladder, which was in so defective a condition, that he was precipitated into the hold and seriously hurt; the defendant was held liable (*b*). The principle underlying this and cognate decisions being that there is an imperative duty laid upon any occupier or possessor of premises, who invites people to come upon the property for purposes of work or business (in which he is interested) to see that due care has been exercised in the construction and maintenance alike of the principal structure, and of all appliances necessary for the due execution of the particular employment or business in respect of which he has invited the persons to enter upon the property, nor can he discharge this duty by merely contracting with competent people to do the work for him. Thus, too, where the defendant, a colliery owner, consigned coals to his customers by rail in his own trucks and through the negligence of his servants one of such trucks was allowed to leave the colliery in a defective state, and in consequence of the defect injury was occasioned to the plaintiff, one of the customers' servants, who was employed in unloading the coals and had got

Whether it would also apply to the latter is doubtful, because it is not customary for a patient, for whom a medicine has been specially prescribed, to hand it over for use to another person.

(*a*) *Heaven* v. *Pender*, (1883) 11 Q. B. D. 503; and see *Traill* v. *Actieselskabet Dalbeattie Ltd.*, (1904) 6 F. 798, Ct. of Sess. But see *Earl* v. *Lubbock* (1905) 74 L. J. K. B. 121.

(*b*) *Marney* v. *Scott*, (1899) 1 Q. B. 986; *Harris* v. *Perry*, (1903) 2 K. B. 219.

into the truck for that purpose, the plaintiff was allowed to recover (*a*). So, again, where the defendant, a gasfitter, who was employed by the plaintiff's master to repair a gas meter upon his premises, for the purpose of so doing took away the meter and in lieu of it made a temporary connection between the portions of the supply pipe, which connection owing to his negligence was insufficient, and upon the plaintiff, in the course of his employment and without negligence, going with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him, the defendant was held liable (*b*). "To support such a right of action," said Lopes, J., "there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance (*c*). It is a misfeasance independent of contract" (*d*). The case of *Collis* v. *Selden* (*e*) may appear at first sight to be in conflict with the authorities already cited, but it is not so, it is apprehended, in reality. There the plaintiff alleged that the defendant had negligently hung a chandelier in a public-house knowing that the plaintiff and others were likely to be there, and that unless properly hung it was likely to fall and injure them, and that in consequence of the negligent hanging it fell and injured the plaintiff. The declaration was held bad, but only on the ground that it did not disclose sufficiently the relation between the parties and the duty thence arising of the one towards the other. The decision was upon the form of the pleading rather than upon the substance of the action. It has, however, been held that, in the absence of a covenant to repair, a landlord who lets a house in a dangerous condition is under no liability to a tenant, or his licensees, for injury arising therefrom (*f*).

Duty limited to persons for whom it is reasonable to rely on care having been taken.

In all the above cases it was reasonable for the plaintiff to

(*a*) *Elliott* v. *Hall*, (1885) 15 Q. B. D. 315.

(*b*) *Parry* v. *Smith*, (1879) 4 C. P. D. 325.

(*c*) And see *Solomons* v. *Stepney Borough Council*, (1905) 3 L. G. R. 912.

(*d*) *Parry* v. *Smith*, (1879) 4 C. P. D. 325.

(*e*) (1868) L. R. 3 C. P. 495. See the observations of Grove, J., upon this case. *Elliott* v. *Hall*, (1885) 15 Q. B. D. p. 320.

(*f*) *Lane* v. *Cox*, (1897) 1 Q. B. 415; and see *Cavalier* v. *Pope*, (1905) 74 L. J. K. B. 857, C. A.

assume that care had been taken, and the defendant must have known at the time of creating the source of danger that third persons were likely to come into contact with it by the licence or direction of the person to whom the user of the chattel temporarily appertained, or for whom the work was done, as the case might be, and so coming were likely to rely on care having been taken (*a*). Where, however, the circumstances are such as to render it unreasonable for the plaintiff to assume that care has been taken no action will lie, if by reason of his reliance he has been injured. Thus, if a person were poisoned by drinking the contents of a medicine bottle, which he had found lying in a cupboard, upon the faith of the contents corresponding with the label, which bore the name of a harmless medicine, he could not be heard to complain, even though the contents so drunk were the very contents with which the bottle was originally sold, for no reasonable person finding a strange bottle would infer that there was a necessary correspondence between the label and the contents at the time of his finding it. So where certain customers of the plaintiff, a ketchup manufacturer, were in the habit of consigning to him empty casks by the defendants' railway, which the plaintiff filled with ketchup and returned, and the defendants, knowing the purpose for which the casks were so sent to the plaintiff, on one occasion carelessly sent him some wrong casks, not belonging to the customers, and which had contained turpentine, whereupon the plaintiff, without making any examination of the casks, filled them with ketchup, which was spoiled, the defendants were held not liable, on the ground that the plaintiff's conduct was unreasonable, and that the defendants, at the time of delivering the casks, were not bound to assume that the plaintiff would fill them without examining them (*b*).

To entitle injured party to complain he must have used the dangerous thing in the manner intended.

But in order to render a person liable for carelessly issuing a dangerous thing which causes damage to third persons who deal with it on the basis that it may be safely dealt with, the thing must have been dealt with in the manner intended by the party issuing it, or at all events, in a manner contemplated by him as one in which it was not unlikely that it would be dealt with. Thus

(*a*) *Caledonian R. Co.* v. *Mulholland*, (1898) A. C. 216.

(*b*) *Cunnington* v. *Great Northern R. Co.*, (1833) 49 L. T. N. S. 392.

the defendant in the case of *Heaven* v. *Pender*, above referred to, would have been under no liability towards a person who used the staging for a purpose which would have subjected the ropes to a greater strain than they would have been subjected to if used for the purpose of painting the ship. Again, if a thing though dangerous if used by one class of persons, is not dangerous if used by another, the party issuing it will not be responsible for damage resulting from its use unless he contemplated its being used by the class of persons to which the plaintiff belonged (*a*). "Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child, and does injury, it could not be contended that the chemist was liable" (*b*). But subject to these limitations, that the plaintiff must have acted reasonably in assuming that care had been taken to prevent injury, and that the thing must have been used in the mode in which, and by the kind of person by whom, it was intended to be, or contemplated as likely to be used, it seems that the party negligently issuing the dangerous thing will be liable to *any* person who may be injured by reason of that negligence, whoever that person may be (*c*). And it is apprehended that this rule applies wherever the case falls within any one of the three classes above mentioned (*d*), in which the party issuing the dangerous thing would

Injured party must be one of a class of persons by whom defendant contemplated the thing being used.

(*a*) And *à fortiori* this rule applies when the article was not intended for the food of man: *Wieland* v. *Butler Hogan*, (1904) 73 L. J. K. B. 513.

(*b*) *Per* Pigott, B., *George* v. *Skirington*, (1869) L. R. 5 Ex. p. 4.

(*c*) In the above cited case of *Heaven* v. *Pender*, ((1883) 11 Q. B. D. pp. 510, 515), it is said that where a person supplies goods for use, the law (apart from contract) imposes an obligation to take care that they are in a condition to be safely used only where they are intended to be used *immediately*. This, however, must be read in connection with the class of goods with which the Court was then dealing, goods which were likely to deteriorate with lapse of time, by exposure to the weather or other causes, and with respect to which, if an accident happened only after a considerable interval of time, it would be right to caution the jury against finding that their original faulty condition was the cause of the accident. Where, however, it can be demonstrated that no change has taken place in the condition of the goods in the interval between the supply and the accident, the length of that interval must be perfectly immaterial. If, for instance, a chemist supplies a poison in a sealed bottle as and for a harmless drug, and the purchaser does not open it for a year, the lapse of time cannot affect the liability of the vendor, for length of time cannot convert one drug into another, though it may convert a sound rope into a rotten one.

(*d*) pp. 468 *sqq*.

be liable to the immediate person to whom he issued it, that is to say, that it applies not merely where the thing was issued under a contract for consideration, but also where the party issuing it knew of some concealed source of danger, or was a person of such known superior skill as would naturally induce the other party to rely upon it.

Loan of dangerous chattel.

Where the original transaction under which the dangerous thing is issued is a gift, it is presumed that the donor will stand in precisely the same position as a vendor, and will be liable to any third persons to whom the donee may give, lend, or sell the subject-matter of the gift, for any injury resulting from his non-disclosure of any dangerous quality which he may know that it possesses. But where the original transaction is a loan it seems that the rule is otherwise, for the lender of a chattel does not as a rule contemplate the borrower lending it again to third parties, a loan being in its nature personal, and it being intended that the thing lent shall be returned *in statu quo*. Though the lender is as towards his immediate borrower liable for non-disclosure of dangerous qualities, he is under no corresponding liability towards strangers to whom the borrower may lend the thing. Therefore, where the defendants, a railway company, were possessed of a crane at one of their stations, the gratuitous use of which crane they allowed to the consignees of goods sent by rail to such station, and the servants of a consignee, who were engaged in using the crane, requested a passer-by to assist in raising it, and whilst he was so doing the chain of the crane being defective broke and killed him, the defendants were held not liable to his representatives, although the defective condition of the chain which was the cause of the accident was known to them (*a*).

Cases of *Winterbottom* v. *Wright* and *Longmeid* v. *Holliday* discussed.

There are two cases which have sometimes been regarded as negativing the view above put forward (*b*), but on examination it will be seen that they in reality do not. The first is *Winterbottom* v. *Wright* (*c*). There a declaration was held bad on demurrer which alleged that the defendant had contracted with the Post-

(*a*) *Blakemore* v. *Bristol & Exeter R. Co.*, (1858) 8 E. & B. 1035; and see *Earl* v. *Lubbock* (1905) 1 K. B. 253.

(*b*) pp. 471 *sqq.*

(*c*) 1842) 10 M. & W. 109.

master-General to provide a coach to carry the mails along a certain line of road, and had agreed that during the contract the coach should be in a fit and secure condition for the purpose, that one Atkinson had contracted with the Postmaster to supply horses and coachmen for the coach, that the plaintiff hired himself to Atkinson to drive the coach, and that the defendant so negligently conducted himself and so disregarded his contract, that while the plaintiff was driving the coach it broke down in consequence of certain latent defects in its condition, and the plaintiff was thrown off and injured. But the statement that the accident was caused by a *latent* defect is inconsistent with its having been the result of negligence. It is quite consistent with that decision that had the defendant been the manufacturer of the coach, and negligently constructed it of improper materials, the plaintiff would have had a good cause of action. There was there, as between the defendant and the Postmaster, assumed, rightly or wrongly (*a*), to exist an absolute contract to provide a sound coach, and the declaration was nothing more than an attempt to sue on that contract by a person who was a total stranger to it. The other case is that of *Longmeid* v. *Holliday* (*b*), where the defendant sold a lamp to the plaintiff's husband to be used by him and his wife, which lamp, upon being used in the ordinary way, owing to its defective construction burst and injured the plaintiff. The jury having found that the defendant, who did not himself manufacture the lamp, sold it in good faith and in ignorance of the defect, it was sought to rest the claim upon the breach of an implied warranty of fitness which it was assumed (*c*) existed towards the husband. The Court held that the plaintiff could not recover; but this again was merely an attempt to sue on a contract by a person not party to it. There was no suggestion of any negligence on the part of the defendant, and on this ground Kelly, C.B., distinguished the case in *George* v. *Skivington* (*d*). The decision itself cannot be regarded as any authority for the proposition stated in the headnote, that a

(*a*) See *Redhead* v. *Midland R. Co.*, (1869) L. R. 4 Q. B. 379.

(*b*) (1851) 6 Exch. 761; see also *Gordon* v. *McHardy*, (1903) 6 F. 210 Ct. of Sess.

(*c*) As to the law on this point, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14.

(*d*) (1869) L. R. 5 Ex. p. 4.

tradesman who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article (*a*). Indeed the notion that fraud on the part of the vendor would in such a case better the position of the plaintiff, seems to be founded on a misconception; for it is essential in an action for fraud that the defendant should have intended to deceive the plaintiff (*b*), and it is obvious that in such a case as *Longmeid* v. *Holliday* the defendant did not so intend, for he had nothing to gain by the plaintiff's using the lamp at all (*c*).

Distinction where injury not physical.

In all the cases above referred to the injury which the plaintiff complained of as the result of his using the thing issued by the defendant in the manner intended was a physical injury. In *Cann* v. *Willson* (*d*) an attempt was made to extend the principle of those cases to a case in which the injury resulting from the intended user was, from the very nature of the thing, not physical, but pecuniary, only. There, an intending mortgagor, at the request of the plaintiff, the intending mortgagee, applied to the defendants, a firm of valuers, for a valuation of the property proposed to be mortgaged, and the defendants, knowing that the valuation was intended for the use of the mortgagee, negligently over-valued the property, whereby, on the mortgage being carried out, the plaintiff sustained damage. Chitty, J., held the defendants liable on the principle of *George* v. *Skivington* (*e*). He was of opinion that as the valuation, if used in the way in which it was intended to be used, would be likely to produce damage unless it was carefully made, it was just as much a dangerous thing as was the hair-wash in the case referred to. However, in *Scholes* v. *Brook* (*f*), where a similar question arose, Romer, J. refused to follow *Cann* v. *Willson*. He there said, "Cases have been cited which, it is said, establish such a liability. But, apart from *Cann* v. *Willson*, it appears to me that the authorities may be divided into two classes. One of those classes is where one

(*a*) And see *ante*, pp. 471 *sqq.*

(*b*) See *Peek* v. *Gurney*, (1873) L. R. 6 H. L. 377.

(*c*) See discussion on this subject below, at p. 545.

(*d*) (1888) 39 Ch. D. 39. But see *Lore* v. *Mack*, (1905) 92 L. T. 345.

(*e*) (1869) L. R. 5 Ex. 1.

(*f*) (1891) 63 L. T. N. S. 837.

person invites another to come upon his premises, in which case the person giving the invitation must use reasonable care to ensure that the condition of the premises does not subject the person invited to danger. Another class is where a person becomes liable for using or leaving about in such a way as to cause danger an instrument which is dangerous in itself (*a*). Beyond those two classes, I am not aware for the moment of any circumstances under which a person can be held liable in a case such as that which has been argued before me. But the present case falls within neither of those two classes. An invitation to advance money or take shares on a valuation or on a prospectus does not, I think, come within the first class, nor can a valuation or a prospectus be considered a dangerous instrument within the meaning of that term as used above by me." The expression "dangerous in itself" must be there understood as meaning nothing more than "liable to cause *physical* injury." It was not apparently intended to dissent from *George* v. *Skivington*, and yet there is nothing in a hair-wash which is "dangerous in itself" in the ordinary sense of that expression; it is only dangerous if used in the manner in which it is intended to be used. In *Le Lievre* v. *Gould* (*b*), where the plaintiffs, mortgagees of the interest of a builder under a building agreement, advanced money to him on the faith of certain certificates issued by the defendant, a surveyor, which certificates owing to the defendant's negligence were untrue, it was held that, in the absence of any contractual relation between the plaintiffs and the defendant, there was no duty on the defendant as towards the plaintiffs to take care that his certificates were correct, and that an action for the resulting loss could not be maintained. *Cann* v. *Willson* was there expressly overruled. Bowen, L.J., observed that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly" (*c*). In short, that case may be regarded as establishing that the principle of *George* v.

(*a*) And see *Sullivan* v. *Creed*, (1904) 2 Ir. R. 317, C. A.

(*b*) (1893) 1 Q. B. 491.

(*c*) At p. 502. Whether the law is strictly logical in drawing that distinction is open to question.

Skivington and *Heaven* v. *Pender* applies only where the injury is physical. Where the injury is not physical there must either be contract or fraud, negligence will not suffice. On the same principle it had been previously held in *Dickson* v. *Reuter's Telegram Co.* (*a*) that the careless delivery of a telegram to a person for whom it was not intended, whereby that person acting on the faith of it suffered damage, was not ground of action. There, the defendants delivered to the plaintiffs, a firm of merchants at Valparaiso, a telegram instructing them to ship barley to Liverpool. The plaintiffs executed the order, and then discovered that the telegram was not intended for them but for another firm, the defendants having carelessly mistaken the registered address of such firm for that of the plaintiffs. The price of barley having fallen, the plaintiffs sued the defendants for the loss. It was held that they could not recover. It has, however, been held by the Irish Court of Appeal (*b*) that where a person, or corporate body, neglects to employ an occasional, but not universal, method of testing a mechanical appliance, and pecuniary loss results to a third party from a latent defect, which would have been discovered had the test been applied, the omission amounts to actionable negligence.

Duty of owner of premises towards persons coming there.

Closely connected with the branch of liability above discussed, the liability that is to say attaching to the issue for use of chattels which are dangerous, is that which attaches in cases in which, the owner of premises having invited others to come thereon, such persons so coming there have suffered damage by reason of the premises being in an unsafe and dangerous condition. The owner so inviting others to come there is not indeed an insurer of the safety of the premises, but the invitation gives rise to a certain duty towards the persons accepting it, the extent of which duty varies according as the owner does or does not derive benefit and advantage from their coming there.

Duty towards persons coming on business.

Where, indeed, they come upon business in which the owner is interested, he is bound, as towards such persons, to "use reasonable care to prevent damage from unusual danger which he knows or ought to know" (*c*). Thus, where the defendant

(*a*) (1877) 3 C. P. D. 1.

(*b*) *Burrell* v. *Tuohy*, (1898) 2 Ir. R. 271.

(*c*) *Per* Willes, J., *Indermaur* v.

occupied a brewery and office and a passage leading thereto from the public street, which passage was the usual means of access for customers going to and from the office, and the defendant negligently allowed a trap-door in the floor of the passage to remain open without being properly lighted or guarded whereby a customer passing along the passage fell through the trap-door, it was held that an action lay (*a*). So the owner of premises owes a duty towards those whom he invites there, to take care to see that the premises are in a fit state of repair, and if, owing to his omission to exercise care in that respect, bricks or tiles or other portions of the structure of the building fall upon them he will be liable.

Duty of owner to give person coming on business notice of concealed danger.

In deference to conventional usage, the duty of an owner of premises towards persons coming there on business is spoken of as a duty to take care that they are reasonably in a safe condition. This, however, is not strictly accurate. The duty is an alternative one, to make the premises safe *or* to warn. If a person driving along a highway is damaged by an obstruction wrongfully placed there the action lies for the wrongful act in causing the obstruction; and though the defendant has given the plaintiff warning of the obstruction that will not necessarily relieve him of liability (*b*): but if the plaintiff suffers similar damage in driving along a private road the cause of action is really very different; for there is nothing wrongful in the owner of a private road making it unsafe by placing an obstruction on it; his duty is discharged by giving due warning of the obstruction. In *Indermaur* v. *Dames* (*c*), Willes, J., in discussing the duty owed towards licensees coming on business, said: "Where there is evidence of neglect, the question whether such reasonable care has been taken by *notice*, lighting, guarding or otherwise, must be determined by a jury as a matter of fact." And in the same case in the Exchequer Chamber (*d*), Kelly, C.B., said: "Is he (the occupier) not bound either to put up some

Dames, (1866) L. R. 1 C. P. p. 288, and see *Marney* v. *Scott*, (1899) 1 Q. B. 988; see *supra*, p. 473.

(*a*) *Chapman* v. *Rothwell*, (1858) E. B. & E. 168. See also *Indermaur* v. *Dames*, (1866–7) L. R. 2 C. P. 311.

(*b*) *Clayards* v. *Dethick*, (1848) 12 Q. B. 439; see also *Lax* v. *Corporation of Darlington*, (1879) 5 Ex. D. 28.

(*c*) (1866) L. R. 1 C. P. at p. 288.

(*d*) (1866–7) L. R. 2 C. P. at p. 313.

fence or safeguard about the hole, or, if he does not, to give such workmen *a reasonable notice* that they must take care and avoid the danger? I think the law does impose such an obligation upon him." In *White* v. *Phillips*, (*a*); where the condition of a campshed under water rendered the berth alongside a wharf dangerous, Erle, C.J., said (*b*) that a duty was cast on the wharfingers towards the owners of vessels using the berth, "either *to give notice* of the danger arising from the campshed being there in that state, or to have had it repaired and properly constructed." So too in *The Moorcock* (*c*), Lord Esher, M.R., speaking of the duty of wharfingers with respect to the condition of their berths, said that "they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or *inform* the persons with whom they have contracted that it is not so." This duty to warn, in cases in which the source of danger is not due to something done by the owner, but is simply the result of non-feasance, as where premises have got into a state of disrepair, involves as towards persons coming on business the earlier duty to take care to acquire knowledge of the unsafety, without which knowledge the warning cannot be given. The breach of duty then which will render an owner of premises liable to a person coming there on business consists either in (1) neglecting to give warning of hidden sources of danger which are known to him (*d*) or in (2) omitting to take proper precautions to acquire knowledge of the danger, and, having acquired it, to give proper warning. As towards bare licensees not coming on business the owner is liable only for negligence of the first kind. But as towards either class of licensees the owner, having given due warning, is free from all responsibility (*e*).

The liability of an owner of land for injury caused by

(*a*) (1864) 33 L. J. C. P. 33.

(*b*) S. C. p. 36.

(*c*) (1889) 14 P. D. at p. 67. And see *Butler* v. *M'Alpine*, (1904) 2 Ir. R. 445. C. A.

(*d*) Thus the owner of premises will be liable if he negligently leaves some chattel, such as a bale of goods, delicately poised in such a position as to be likely to fall and injure persons coming there on business, *White* v. *France*, (1877) 2 C. P. D. 308.

(*e*) See on this point the judgment of Bowen, L.J., in *Thomas* v. *Quartermain*, (1887) 18 Q. B. D., p. 696; and of Lord Herschel in *Membery* v. *Great Western R. Co.*, (1889) 14 App. Cas., p. 191. And see *post*, pp. 515-516.

something escaping from the position where he has placed it, and falling upon and injuring a person who is upon the premises on business at the owner's invitation, differs from the liability for a similar injury caused by a thing falling from off the land and injuring a person who is on the adjoining land or on a highway, in this respect, that whereas the latter liability is, as has been seen (*a*), independent of any question of negligence, the former is not.

Duty of wharfinger.

In the case of a wharfinger occupying a wharf on the bank of a tidal river, and inviting shipowners to bring their vessels to lie alongside for the purpose of loading or discharging goods at the wharf, there exists a somewhat extended duty to take care that the lying berth is reasonably safe (*b*). For although the soil of such berth, being part of the bed of a tidal river, may not be in his occupation or under his control, still as the use of the berth is necessarily incidental to the use of his wharf, and as he is on the spot and consequently has better means of ascertaining whether the berth is safe than those in charge of the ship have, it is reasonable that an obligation should lie on him to ascertain its condition, and upon discovery of a defect either to remove it or give warning of its existence (*c*). Therefore in *White* v. *Phillips* (*d*), where the defendants, who occupied a wharf in the Thames, had deepened the bed of the river adjoining the wharf, and had constructed a campshed to prevent the soil from filling up the deepened part, which campshed was completely covered at high water, and the plaintiffs' barge while loading at the wharf, on the tide ebbing, fell on the campshed and canted over and was injured, it was held that the defendants having given no notice of the existence of the campshed were liable. And this duty on the part of the wharfinger to give warning of unsafety in the condition of the lying berth is not confined to cases in which that condition is due to artificial structures such as the campshed above mentioned, but extends to cases in which the unsafety is due to natural inequalities in the surface of the soil. Thus in *The Moorcock* (*e*), where the plaintiff's vessel, which

(*a*) See above, pp. 438 *sqq.*

(*b*) *Butler* v. *M'Alpine*, (1904) 2 Ir. R. 445, C. A.

(*c*) *The Ville de St. Nazaire*, (1903) 52 W. R. 68.

(*d*) (1864) 33 L. J. C. P. 33.

(*e*) (1889) 14 P. D. 64.

was of such draught that it could not lay alongside the defendants' jetty in the river Thames without grounding at low water, while discharging its cargo at the jetty settled on a ridge of hard ground underneath the mud and sustained damage, it was held that the defendants were answerable, for they were bound to ascertain the condition of the bottom and either level it or else give due warning. Whether in any case the duty of the wharfinger, where the soil of the river is not in his occupation, extends beyond the actual limits of the berth itself to the access of the berth, is doubtful. In *The Calliope* (*a*) Lord Watson was indeed of opinion that wharfingers are "bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay" (*b*). This, however, was apparently doubted by Lord Halsbury (*c*) on the ground of the impossibility of fixing any limit at which such an obligation is to cease. It may well be that wharfingers are bound to give warning of any source of danger connected with the approach to the berth of which they are aware, but why they are bound to ascertain the condition of the bottom beyond the actual limits of the soil they use it is difficult to say (*d*).

This obligation, however, to take care that the premises are reasonably safe does not exist towards all persons who are invited thereon by the owner, but only towards such as are so invited for his benefit, that is to say, upon business in which he has an interest. It does not exist towards bare licensees who come there for their own pleasure or convenience alone (*e*). Therefore a declaration which alleged that the defendants were possessed of certain waste land on which was a quarry, that all persons having occasion to pass over the waste had been accustomed to go across it by the permission of the owners, that the quarry was precipitous, and dangerous to persons so crossing, and that

(*a*) (1891) A. C, 11.
(*b*) (1891) A. C. p. 23.
(*c*) *Ibid.* p. 17.
(*d*) As to the limitations on liability, see *Parker* v. *Plomesgate Rural Council.* (1903) 9 Com. Cas. 107.
(*e*) *Giles* v. *London County Council* (1904) 68 J. P. 10.

the defendants knowing the premises negligently left the quarry unfenced, whereby the plaintiff, who had occasion to cross the waste on a dark night, and was unaware of the existence of the quarry, fell into it and was injured, was held bad on demurrer (*a*). It is, however, provided by section 13 of the Metalliferous Mines Regulation Act, 1872 (*b*), where a mine is abandoned or the working thereof is discontinued the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be fenced. The term "owner," does not, however, include a person who is merely the owner of the soil and is not interested in the minerals of the mine (*c*).

One who for his own convenience goes upon land by the owner's permission "must take the permission with its concomitant conditions and it may be perils" (*d*); were he to complain that the premises were unsafe, his complaint would, as has been said, wear the colour of ingratitude. So, where the landlord of a house let out in apartments to different tenants gratuitously allowed the tenants to use the leads on the roof of the house (which leads were fenced round with an iron rail) for the purpose of drying their linen, and one of the tenants went on to the roof for that purpose, and having accidentally fallen against the rail, by reason of the rail being out of repair fell down into the courtyard below, the injured party was held not entitled to recover against the landlord, for the mere licence to use the roof imposed no duty upon the licensor to keep the fence in repair (*e*). It is submitted, however, that in this case the licence to use the roof is not easily separable from the tenancy of the rooms, to which the licence probably gave an enhanced value.

Who are persons coming on business.

The rule, however, that the obligation to take care is owed only to persons coming on the premises for the benefit of the

(*a*) *Hounsell* v. *Smyth*, (1860) 7 C. B. N. S. 731 : and see *Devlin* v. *Jeffray's Trustees*, (1903) 5 F. 130, Ct. of Sess.

(*b*) 35 & 36 Vict. c. 77.

(*c*) *Knuckey* v. *Redruth Rural District Council*, (1904) 1 K. B. 382.

(*d*) *Per* Williams, J., *Hounsell* v. *Smyth*, (1860) 7 C. B. N. S. p. 743. The danger there was not concealed ; see below, p. 491.

(*e*) *Ivay* v. *Hedges*, (1882) 9 Q. B. D. 80. The case of *Southcote* v. *Stanley*, (1856) 1 H. & N. 247, may well be supported on this ground, though not upon the ground put by Pollock, C. B., that a visitor at a house by accepting the invitation becomes a member of the *familia*, and as such brings himself within the rule of *Priestley* v. *Fowler*, (1837) 3 M. & W. 1. See above, p. 88.

licensor has received a very liberal interpretation in favour of the licensee. Thus, where a gasfitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly, and the plaintiff while upon the defendant's premises for this purpose fell through an unfenced shaft in the floor and was injured, he was held to come within the rule, and to be entitled to recover (*a*). It is not necessary that the licensor should have any special interest in the licensee being on the premises at the particular time when the accident happens; it is sufficient that he should derive benefit from, or have an interest in, the transaction as a whole, in the course of which the licensee suffers the injury (*b*). Thus where a ship entered a dock to load, and, the propeller having fouled a rope while she was crossing the dock, the dock-master permitted her gratuitously to go into a lock in order that the water might be drawn off and the propeller cleared, which lock was dangerous for a ship of her draught by reason of the existence of a sill of which the dock-master ought to have known, and the ship grounded on the sill and was damaged, the majority of the House of Lords held that the dock-owners were liable notwithstanding that they got no extra consideration for the use of the lock (*c*). Nor is it necessary that the owner should in fact derive benefit from the licensee's presence: it is enough that he has an interest in his being there, which includes the possibility of deriving benefit (*d*). "The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is merely chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know. This protection does not depend upon the fact of a contract being entered into in the way of the

(*a*) *Indermaur* v. *Dames*, (1866–7) L. R. 2 C. P. 311.

(*b*) See *Holmes* v. *North Eastern R. Co.*, (1869–71) L. R. 6 Ex. 123.

(*c*) *The Apollo*, (1891) A. C. 499. Lords Bramwell and Morris, however, dissenting, were of opinion that the shipowner was a bare licensee.

(*d*) *Wright* v. *Lefevre*, (1903) 51 W. R. 149, C. A.

shopkeeper's business during the stay of the customers, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was" (*a*). In one case, where a barge of the defendant was being unlawfully navigated on the river Thames by a single man (the rules of the Conservancy requiring that she should have had two on board), and the plaintiff, a waterman in want of employment, seeing this, went on to the defendant's wharf to complain to the defendant's foreman, and whilst there was injured by reason of the premises having been negligently permitted to be in an unsafe condition, it was held that the plaintiff was on the premises on business in which the defendant had an interest (*b*).

Just as, in cases in which chattels have been issued for use under a contract, the duty of the party so issuing them to take care that they shall not be dangerous to the persons using them is not confined to the immediate persons to whom they are issued, so too in the case of premises, upon which the owner invites other persons to come on business, the duty of the owner to take care that the premises are safe is not confined to the persons going there on business in which the owner is directly interested. Thus in *Smith* v. *London & St. Katharine Docks Co.* (*c*), where the defendants provided and retained under their control gangways from the shore to the ships lying in their docks, and the plaintiff, an optician, who had gone on board one of the ships in the docks, at the request of one of her officers, to show him some nautical instruments, whilst returning across the

(*a*) *Per* Willes, J., *Indermaur* v. *Dames*, (1866) L. R. 1 C. P. p. 287.

(*b*) *White* v. *France*, (1877) 2 C. P. D. 308.

(*c*) (1868) L. R. 3 C. P. 326. In this case there was a suggestion (though apparently no finding of the jury) that the source of danger was a trap known to the defendants, but nothing turned on this. The Court evidently did not intend to limit their decision to that class of cases. For rule in case of a trap, see *Harris* v. *Perry*, (1903) 2 K. B. 219.

gangway which, owing to the negligence of the defendants, was insecure, fell and was injured, the defendants were held liable on the ground that he was a person "having business on board the ship," although not business in which the defendants were interested (*a*). And in *Heaven* v. *Pender*, Cotton and Bowen, L.JJ., went a step further and held that a dock-owner, who supplied and put up stages for immediate use to enable the outsides of ships to be painted while lying in the dock, was under a duty, towards all persons employed by the shipowners to paint their ships, to see that the stages were reasonably safe, although at the time of their use by the painters the stages were temporarily out of the dock-owners' control (*b*). On the same principle in *Miller* v. *Hancock* (*c*) it was held that the owner of a building let out in flats, served by a common staircase, which staircase he was under a contractual duty towards his tenants to repair, was liable to a third person, who came on behalf of a railway company to collect some money due from one of the tenants to the company, and owing to the defective condition of the stair fell and was injured. "The landlord," said Bowen, L.J., "has given the tenant a right to use the staircase, and undertaken to keep it in repair; and he knows that persons who have business with the tenant will be coming up and down the stairs, and those persons will use the stairs on the understanding that they may lawfully do so, and that in doing so they will be shielded by the responsibility of the person on whom the liability to repair the staircase may rest" (*d*).

Duty towards bare licensee to warn of concealed danger known to licensor.

But although as towards a bare licensee there is no duty on the licensor to exercise care to have the premises in a reasonably safe condition, yet he is bound to warn the licensee of any concealed source of danger, the existence of which is actually known to him, as where a bridge over which he permits others to pass

(*a*) And see *Madoc* v. *Ryde Pier Co.* v. *Times Newspaper*, Feb. 3rd, 1905, C. A.

(*b*) (1883) 11 Q. B. D. p. 515. They treated the use of the painting stage as so incidental to the use of the dock, that, although the stage was not actually under the dock-owner's control, it might practically be regarded as part of the dock premises. From their point of view the duty of the dock-owner was evidently analogous to that of the wharfinger in respect of the bed of the river adjoining his wharf, which is mentioned above, p. 484.

(*c*) (1893) 2 Q. B. 177.

(*d*) *Ibid.* p. 181.

is to his knowledge unsafe (*a*), or where he leaves a trap-door open in the floor of a dark passage which he permits others to use. By a concealed source of danger is meant one which is not apparent to a person who keeps his eyes open and uses ordinary care. The permission to use the premises may well be treated as involving a representation of the existence of that state of things which the licensee has a right to expect. "One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon so that other persons lawfully coming there may receive injury" (*b*). Where the owners of a house with a private road leading to it permitted the defendant to stack some slates on a portion of the road, and the plaintiff's servant who was driving his master's horse and carriage to the house by night, not seeing the slates, drove against them and injured the horse, the defendant was held liable (*c*). And where a bale was nicely poised at the edge of a warehouse in such a position as to be likely to fall and yet to give no warning of danger to any one passing by the spot, it was held that this state of things was in the nature of a trap or concealed source of mischief, so as to render the owner of the warehouse liable to a bare licensee who was injured by the bale falling on him (*d*). But where the workmen in a Government dockyard were permittted to pass across a certain yard, in which the defendant, a contractor, had by the leave of the authorities erected certain machinery, including a revolving shaft, which shaft was partially but insufficiently fenced with planks, and the plaintiff, one of the workmen, while crossing the yard stumbled and fell against the shaft and was injured, the defendant was held not liable, on the ground that he was under no obligation to fence the shaft at all, and that in such fencing as there was the defect was not deceptive but apparent (*e*). "The danger was open and visible; there was nothing which could be called a trap" (*f*). In an Irish case, where the action was

(*a*) *Gautret* v. *Egerton*, (1867) L. R. 2 C. P. 371.

(*b*) *Per* Willes, J., *Corby* v. *Hill*, (1858) 4 C. B. N. S. p. 567.

(*c*) *Corby* v. *Hill*, (1858) 4 C. B. N. S. 556. The case was treated as raising the same question as if the owners of the road had placed the slates there, and the action were against them.

(*d*) *White* v. *France*, (1877) 2 C. P. D. 308.

(*e*) *Bolch* v. *Smith*, (1862) 7 H. & N. 736.

(*f*) *Per* Wilde, B., *ibid.*, p. 747. Here

brought under Lord Campbell's Act, the plaint, which alleged that the deceased was allowed the gratuitous use of a loft over the defendant's distillery to sleep in at night, that he used the loft under such licence, and that the defendants negligently permitted an aperture in the floor of the loft to remain open, whereby the deceased fell through the aperture at night and was killed, was held bad on demurrer (*a*); but the decision appears to have turned on a narrow point of pleading. "The aperture not being stated to have been concealed we cannot presume that it was other than open and apparent. The defendants are stated to have permitted the aperture to *remain* open. The deceased is stated to have *used* the loft for sleeping. The statement, therefore, negatives the fact of the aperture having been for the first time open when the deceased fell through it, and shows that he had previous means of knowing its existence" (*b*). From the stress thus laid on the fact of the deceased having had previous opportunity of inspecting the loft and discovering the existence of the hole, it seems clear that had the accident happened on the first occasion on which the deceased used the loft, the Court would have held the hole to be a concealed source of danger, inasmuch as it could not be actually seen, the loft being dark, and moreover was a source of danger not to be reasonably anticipated. Persons who go for the first time at night across an open common must not be surprised if they tumble into a pit or quarry (*c*), but no one expects to find a hole in the floor of a room (*d*).

It was mainly upon the ground of this duty to warn a bare licensee of any concealed danger known to the licensor that the judgment of the majority of the Court of Appeal in *Foulkes* v. *Metropolitan District R. Co.* (*e*) proceeded. There the defendants, who had running powers over a line belonging to the L. & S. W. R. Co., carried the plaintiff as a passenger in a carriage which to their knowledge was unsuited to the platform at Richmond, a

again the case was decided as if it were between the plaintiff and the owners of the yard.

(*a*) *Sullivan* v. *Waters*, (1864) 14 Ir. C. L. R. 460.

(*b*) *Per* Pigot, C.B., *ibid.*, p. 475.

(*c*) *Hounsell* v. *Smyth*, (1860) 7 C. B. N. S. 731.

(*d*) See *per* Bramwell, B., *Wilkinson* v. *Fairrie*, (1862) 1 H. & C. at p. 634.

(*e*) (1879–80) 5 C. P. D. 157.

station on the L. & S. W. line, and consequently dangerous to alight from at that place. The plaintiff, who was travelling with the return half of a ticket issued to him by the L. & S. W. R. Co., while alighting from the carriage at Richmond, fell in consequence of the carriage being so unsuited to the platform and was injured. It was held by Bramwell and Baggallay, L.JJ., that even assuming that the ticket issued by the L. & S. W. R. Co. did not create any contract between the plaintiff and the defendants, the defendants were liable to him in tort on the ground that "the combined arrangements were a trap or snare" (*a*).

Who are bare licensees.

As towards trespassers indeed there is no implied representation of safety at all, and therefore no duty to warn of any concealed source of danger, but it is sometimes a matter of difficulty to determine whether a person is a trespasser or a licensee. It seems clear the invitation or licence to come on the premises need not be express (*b*); a licence will in many cases be implied. The existence of a private road leading to a house, being the usual mode of access to it, probably operates as an implied licence to any person living in the neighbourhood who might in the ordinary course be expected to call upon the owner to use it for that purpose. But it cannot be regarded as a licence to a passer-by to enter for the purpose of asking the way, nor to a hawker to come there for the purpose of hawking his goods (*c*), nor to a beggar to come there for alms. Such persons must be regarded as trespassers.

Negligent communication of infectious disease.

Whether a person who, knowing himself to be suffering from an infectious disease such as small-pox or scarlet fever, negligently communicates such disease to another is in all cases liable to an action for damages is a question which cannot as yet be regarded as definitely decided. But it is apprehended that he is so liable (*d*). There seems to be a legal duty not to do any

(*a*) As to whether the existence of an infectious disease upon premises is a concealed danger of which the licensor is bound to give warning, see below, p. 495.

(*b*) *White* v. *France*, (1877) 2 C. P. D. 308.

(*c*) See *per* Bovill, C.J., *Smith* v. *London & St. Katherine Docks Co.*, (1868) L. R. 3 C. P. p. 332.

(*d*) By s. 68 of the Public Health (London) Act, 1891, any person who when suffering from any dangerous infectious disease wilfully exposes himself, without proper precaution against spreading the disease, in any public place, is liable to a fine not exceeding 5*l*.

unnecessary act which would have the effect of directly communicating such disease. Indeed it seems difficult to distinguish upon principle the act of negligently communicating an infectious disease from that of negligently causing a person to absorb a poison of any other kind. In *Davies* v. *England* (*a*) a count was held good which alleged that a master who, knowing certain carcases of slaughtered cattle to be diseased and infectious, employed the plaintiff who was ignorant of their infectious condition to cut them up, whereby he was infected. In that case there was no doubt a contractual relationship between the parties, but it is conceived that the existence of that relation is not essential to the creation of the duty. In *Hegarty* v. *Shine* (*b*) a woman sued her paramour for communicating to her a venereal disease. It was held that the action would not lie on the ground that the case fell within the maxim *ex turpi causâ non oritur actio*. As that is apparently the only case in which that maxim has ever been expressly applied to an action of tort, the Court would presumably have avoided so novel an application of it if they could have done so by deciding the case on other grounds. It is to be inferred from the grounds upon which they proceeded that they would have held the negligent communication of any infectious disease, not involving an act of immorality, to be actionable. Lord Hale indeed in his Pleas of the Crown said that if a person suffering from an infectious disease "goes abroad to the intent to infect another, and another is thereby infected and dies, whether this be murder or not by the common law might be a question," and he apparently rested his doubt upon the ground that "it is hard to discern whether the infection arise from the party, or from the contagion of the air" (*c*). Having regard to the state of medical knowledge in his day, that doubt may well have been justified; and for the same reasons it may be doubted whether, in the event of the disease so communicated not proving fatal, a civil action for damages would have lain at that day. But now that the periods of incubation of the various infectious diseases are sufficiently determined to allow of the precise date of the contraction of the disease being

(*a*) (1864) 33 L. J. Q. B. 321.
(*b*) (1878) 14 Cox, C. C. 124, 145.
(*c*) Vol. 1, p. 432.

fixed with reasonable certainty, the ground of Lord Hale's doubt is to a great extent removed. It is submitted that at the present day if a person wilfully infects another with intent to kill, and the other dies, such act of infection is murder; that if the act be done negligently and without intent, and the infected person dies, it is manslaughter; and that if, whether the act be done intentionally or negligently, the infected person recovers, an action on the case lies for the injury so caused. If an owner of a house knowing it to be infected invites another to come there, the fact of the infection is a concealed danger or trap which, it is presumed, he is as much bound to disclose as he is to disclose the existence of an unfenced hole in the floor. So if a surgeon in performing an operation uses a knife which he knows to be infected, or if a person who knows himself to be suffering from an infectious disease shakes a friend by the hand, if damage ensue an action ought to lie. In *R.* v. *Vantadillo* (*a*) it was held to be an indictable nuisance to take a person who was suffering from small-pox through a public street, from which it follows that a person who suffers special damage from such an act would have a right of action (*b*). It need not, however, be inferred that the right of action is confined to cases in which the act causing the communication of the disease amounts to an act of nuisance. In the latter case of *Reg.* v. *Clarence* (*c*), Stephen, J., indeed suggests that it is only in such cases that the act is indictable (*d*). But he was there dealing with cases of communication of disease not resulting in death, which, unless they amount to nuisance, cannot be brought within any of the well-defined categories of crime, for the act of communication does not amount to an assault; he did not apparently intend to negative the proposition that such act of communication, if it resulted in death, would be indictable as manslaughter, or if it caused damage other than death, would be actionable, even though committed towards a single individual in a private house. But even if the above view be correct, that a person who knowing himself to be suffering from infectious disease negligently

Communication of disease must be result of a positive act done.

(*a*) (1815) 4 M. & S. 73.
(*b*) And see 38 & 39 Vict. c. 55, s. 126; 54 & 55 Vict. c. 76, s. 68.
(*c*) 1888) 22 Q. B. D. 23.
(*d*) *Ibid.*, p. 40.

communicates it to others is civilly liable for the consequences irrespective of the place where the communication occurred, it seems he is only so liable if the communication was the result of a positive act done by him. Mere passive non-disclosure will not suffice. In *Sarson* v. *Roberts* (*a*) the defendant let to the plaintiff furnished lodgings which were free from infection at the time of the letting, but while the plaintiff was in occupation of them the defendant's grandchild became ill with scarlet fever. The defendant concealed the fact of the illness from the plaintiff, with the result that the plaintiff's wife and child took the fever. It was held that there was no duty on the defendant to disclose the fact of his grandchild's illness, and that an action to recover the expenses of medical attendance and nursing would not lie. Mere proximity, where no positive act is done, will not give rise to such a duty. But it is conceived that if the premises had been infected at the time of the plaintiff's entry on occupation the defendant would have been liable (independently of any doctrine of implied warranty that they were fit for habitation), upon the ground that the act of inviting the plaintiff on to the premises was a positive act done by the defendant, and that in such case the action would equally have lain whether the plaintiff was a tenant or a bare licensee.

Selling diseased animals.

Where a person sells animals which he knows to be suffering from infectious disease, and which he knows the purchaser may put with other animals of his own to their injury, such sale will be a positive act within the above suggested rule, and there will presumably be a duty to disclose the fact of the infection, the maxim of *caveat emptor* notwithstanding. But as the motive of a vendor who in such a case conceals the disease is always to defraud, it has been thought more appropriate to deal with the subject of his liability for such concealment in the chapter on Fraud (*b*).

Party pulling down his house under no duty to take care as towards owner of modern house adjoining.

In one case (*c*) the judgment of the Exchequer Chamber seems to have left it as an open question whether there is not a duty

(*a*) (1895) 2 Q. B. 395, C. A.

(*b*) As to which see below, pp. 528 *sqq*. For recent cases on the law relating to the sale of unsound meat, see *Wieland* v. *Butler-Hogan*, (1904) 73 L. J. K. B. 513; and *Friend* v. *Mapp*, (1904) 68 J. P. 589.

(*c*) *Chadwick* v. *Trower*, (1839) 6 Bing. N. C. 1.

imposed upon a person engaged in pulling down his house to take care not to injure his neighbour's modern house adjoining by withdrawing the support which it has enjoyed. It was there decided that the defendant, who had pulled down his house together with the vault under it, and by reason of his neglect to shore or use other precautions had let down the modern adjoining vault of the plaintiff, was not liable if he had not known of the existence of the vault, a decision which seems to suggest that he would have been liable if he had known of its existence. Such a suggestion, however, is altogether opposed to principle and authority (*a*). Not only is the defendant under no obligation to take care in such a case, but he may lawfully cause the damage intentionally, with the very object of preventing the acquisition of a right of support, though presumably the case would be reversed if the party aggrieved had, by prescription, acquired such a right.

Onus of proof of negligence.

The *onus* of proof of negligence lies in general on the party charging it; but under certain special circumstances the mere happening of an accident will afford *prima facie* evidence that it was the result of want of due care; *res ipsa loquitur*. "Where something happens which would not happen, if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendants" (*b*). Thus the mere occurrence of a railway collision is, in general, enough to throw the *onus* on the company of showing that it was not the result of want of care (*c*). So where a vessel at anchor is run down by another vessel the vessel under weigh is bound to show that the accident did not arise from any negligence on her part (*d*). So where a barrel of flour fell out of an upper window of the defendant's shop upon the plaintiff passing in the street below, it was held that the occurrence was sufficient *primâ facie* evidence of negligence to cast the *onus* of proof on the defendant that the accident was not caused by his negligence (*e*). So where a bag of sugar fell from a crane fixed

(*a*) See *Dalton* v. *Angus*, (1881) 6 App. Cas. 740.

(*b*) *Per* Brett, J., *Gee* v. *Metropolitan R. Co.*, (1873) L. R. 8 Q. B. p. 175.

(*c*) *Carpue* v. *London, Brighton, & South Coast R. Co.*, (1844) 5 Q. B. 747.

(*d*) See *per* Dr. Lushington, *The Batavier*, (1845) 2 W. Rob. p. 407.

(*e*) *Bryan* v. *Boadle*, (1863) 2 H. & C. 722.

over a doorway under which the plaintiff was lawfully passing, in the absence of any explanation of the cause of the bag falling the defendants were held liable (*a*). Again, where a bolting horse runs down a person in broad daylight, there is *primâ facie* a presumption of negligence (*b*). And similarly where a packing-case, which was propped up against a wall, fell upon and injured the plaintiff, it was held that the maxim *res ipsa loquitur* applied, for that "packing-cases do not usually fall of themselves unless there has been some negligence in setting them up" (*c*). Where, however, a pupil-teacher at a school was engaged in teaching a class and was for that purpose using a black-board on an easel, and owing to the pegs of the easel not fitting well, the board fell down and injured one of the scholars, it was held that the maxim did not apply, and that the fall of the board was no evidence of negligence in any one (*d*). It is somewhat difficult to reconcile this case with those previously cited, for boards do not usually fall of themselve any more than packing-cases, and the Court did not apparently suggest any distinction, but contented themselves with saying that each case must depend on its own facts.

Onus of proof in case of carriers.

Where goods are delivered to a carrier upon the terms that the carrier is only to be liable for negligence, if the goods are inanimate, as for example furniture, the fact of damage occurring in the course of transit is probably of itself evidence of negligence (*e*), but where they consist of live animals, and the injuries are such as are equally consistent with restiveness on the part of the animals as with negligence on the part of the carriers, it is no evidence of negligence (*f*). For the maxim *res ipsa loquitur* only applies where what happens fits better with the hypothesis of the existence of negligence than with that of its absence (*g*).

(*a*) *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596; see also *Kearney* v. *London, Brighton, &c., R. Co.*, (1871) L. R. 6 Q. B. 759. See too *per* Lord Halsbury, *Smith* v. *Baker*, (1891) A. C. p. 335.

(*b*) *Snee* v. *Durkie*, (1903) 6 F. 42, Ct. of Sess.

(*c*) *Briggs* v. *Oliver*, (1866) 4 H. & C. 403.

(*d*) *Crisp* v. *Thomas*, (1890) 63 L. T. N. S. 756.

(*e*) *Jolley* v. *Great Eastern R. Co.*, cited (1888) 57 L. T. N. S. p. 814; see also *Price & Co.* v. *The Union Lighterage Co.*, (1904) 1 K. B. 412.

(*f*) *Smith* v. *Midland R. Co.*, (1888) 57 L. T. N. S. 813; and see Wyatt Paine on Bailments tit. Carriers, p. 265, *sqq.*

(*g*) *Cotton* v. *Wood*, (1860) 8 C. B. N. S. 568.

Plaintiff must show that defendant's negligence was the cause of the damage.

To entitle a plaintiff to recover in an action for negligence he must not merely establish the facts of the defendant's negligence and of his own damage, but he must show that the one was the effect of the other; there must, to use an expression of Lord Cairns (*a*), be proof of "*incuria dans locum injuriæ.*" Thus, where the defendants, a railway company, negligently allowed an excessive number of passengers at one station to enter a carriage in which the plaintiff was seated, and at the next station the plaintiff in endeavouring to prevent still more persons from entering the carriage stood up and placed his hand on the edge of the carriage door, and a porter pushed away the persons who were trying to enter and slammed to the door, whereby the plaintiff's thumb was caught and crushed, it was held there was no evidence of such negligence in the defendants as could be said to have occasioned the mischief, and that the plaintiff ought to have been nonsuited, for it was not contended that the porter who shut the door was guilty of any negligence in so doing, and there was no causal connection between the negligence of the company's servants in allowing too many passengers to enter the carriage and the occurrence of the accident (*b*). So, too, if those in charge of a train are guilty of negligence in omitting to whistle at the approach of the train to a level crossing, and a passenger, who is stone-deaf or so drunk that he could not have heard the whistle had it been sounded, is run over while attempting to cross the line, though there is negligence on the part of those in charge of the train it is not negligence *per quod* the damage happened (*c*); and the same might be said if the passenger, notwithstanding the driver's neglect to whistle, saw the train approaching and yet persisted in attempting to cross the line in front of it.

Again where the proximate cause of the accident is the

(*a*) *Metropolitan R. Co.* v. *Jackson*, (1877) 3 App. Cas. p. 198.

(*b*) *Ibid.*

(*c*) *Per* Lord Cairns, *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas. p. 1166; *The Englishman*, (1877) 3 P. D. 18. A deaf man presumably crosses a level crossing of a railway at his peril, for under ordinary circumstances if those in charge of the train give due warning of its approach by whistling, they have discharged their duty, for it is the foot-passenger and not the train that has to get out of the way. But it is otherwise with a deaf man crossing a street. The duty of drivers of vehicles is not confined to merely shouting out warning. See *Smith* v. *Browne*, (1891) 28 L. R. Ir. 1.

intoxication of the person injured there is no liability (*a*). But on the other hand it is negligence, sounding in damages against a railway company, if the company's servants admit a drunken person upon the platform, should he when in that condition inflict injury on another passenger (*b*).

Where, an accident having happened, there is no direct evidence as to its cause, the mere fact that there is evidence of negligence on the part of the defendant which might have caused it, is not necessarily enough to justify the case being left to the jury. Thus where the dead body of a man was found on a railway line near a level crossing at night, the man having been killed by a train which carried head-lights, but did not whistle or otherwise give warning of its approach, but there was no evidence to show how the deceased got on to the line, it was held by the House of Lords that, even assuming that there was evidence of negligence on the part of the railway company (which they did not decide), there was no evidence to connect that negligence with the accident (*c*).

In the subsequent case of *Fenna* v. *Clare* (*d*), the defendants maintained, at a spot immediately adjoining a highway, a low wall eighteen inches high, with sharp spikes on the top, which wall was a nuisance to the highway. The plaintiff, a child of between five and six years of age, was found standing by the side of the wall with her arm bleeding from a wound, such as might have been caused by her falling on the spikes while lawfully passing along the highway. At the trial the child was not called as a witness, and no evidence was given as to how the accident happened, except that of a witness who said that shortly before the accident he saw the plaintiff climbing up on the wall, and told her to get down, which she did. It was held that there was evidence to go to the jury that the nuisance was the cause of the accident. But it seems difficult to reconcile that decision with

(*a*) *McCormick* v. *Caledonian R. Co.*, (1904) 6 F. 362, Ct. of Sess.

(*b*) *Adderley* v. *Gt. Northern R. Co.*, (1905) 2 Ir. R. 378, C. A,

(*c*) *Wakelin* v. *London & South Western R. Co.*, (1886) 12 App. Cas. 41. There was nothing in the facts of that case to show that the deceased had not brought about his death by his own negligence, for, as Lord Halsbury pointed out, there is no "legal presumption that people are careful and look before them on crossing a railway." But cp. *Smith* v. *South Eastern R. Co.*, (1896) 1 Q. B. 178.

(*d*) (1895) 1 Q. B. 199.

the principle of *Wakelin* v. *London & South Western R. Co.*, unless indeed it can be said that, though there is no legal presumption that a person will not be negligent, there may be such a presumption that a person will not commit a wilful trespass. The Court, however, did not profess to proceed upon any such distinction.

Another decision not easily explicable on logical grounds is *Bell* v. *Caledonian R. Co.* (*a*), where a horse belonging to the plaintiff suffered permanent damage by one of its feet being caught in an interstice, in the rails at a level crossing, caused by a wooden wedge not having been driven home.

In this case it was held by the Court of Session that, as the condition of the rails was inspected twice a day by competent servants of the railway company, the fact of such inspection absolved them from liability, although it was admitted in evidence that the passage of a train over the metals at this point was calculated to loosen the wedge, and it was proved that two trains had passed since the last inspection.

Contributory negligence of third party.

To establish the defendant's liability his negligence need not necessarily have been the immediate cause of the injury; provided it be a substantial part of the cause, he will be none the less liable because the injury may have been contributed to by the intervening negligence of a third person (*b*).

Contributory negligence of plaintiff.

But although a defendant whose negligence has been part of the cause of the plaintiff's injury is not relieved from responsibility by reason of the injury having been contributed to by the negligence of a third person, it is otherwise where it has been contributed to by the negligence of the plaintiff himself (*c*). Contributory negligence on the part of the plaintiff in many cases affords a good defence. It is in cases of collisions that this question of contributory negligence most frequently arises. "Those who go personally or bring property where they know that it may come in collision with the persons or property of others, have by law a

(*a*) (1902) 4 F. 431.

(*b*) *Abbott* v. *Macfie*, (1863) 2 H. & C. 744; *Clark* v. *Chambers*, (1878) 3 Q. B. D. 327; *Sullivan* v. *Creed* (1904) 2 Ir. R. 317.

(*c*) The principle of "*volenti non fit injuria*" applies where the injury to the plaintiff was caused by an obvious and easily avoidable danger (*Giles* v *London County Council*, (1904) 68 J. P. 10).

duty cast upon them to use reasonable care and skill to avoid such a collision. And the duty in such cases is reciprocal. With two carriages or two ships of equal weight, the risk of damage, if they come into collision with each other, is about equal, and the reciprocity of duty is obvious (*a*). Where a light gig comes in collision with a heavy wagon, the damage is likely to fall principally on the light gig, and if a man comes negligently in collision with an express train, he will almost certainly be dashed to pieces, whilst those in the express train will very likely be unconscious that any accident has happened. There is a natural feeling in juries in favour of the light gig or the man, who will suffer the chief damage; but the duty cast by law on the light gig or man is the same as that cast on the heavy vehicle, viz.: to use reasonable care and skill to avoid the collision" (*b*).

Rule in *Davies* v. *Mann*.

The rule, however, that the contributory negligence of the plaintiff will in general afford a defence, is subject to the very important qualification, that "if *the defendant* could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him" (*c*); which qualification has also been stated in a somewhat different form, that "although there may have been negligence on the part of the plaintiff, yet unless *he* might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover" (*d*). The former statement is applicable to a case in which the defendant is on the spot at the time of the accident and the plaintiff is not: the latter is applicable to a case in which the plaintiff is on the spot at the time of the accident and the defendant is not; both statements are applicable to a case in which both parties are on the spot; but neither statement seems to suggest whether the qualification applies to a case in which neither party is on the spot at the time of the accident, as for instance where a horse and cart which has been carelessly left unattended in the street starts off by itself and

(*a*) For cases on this point see *ante*, pp. 459 *sqq*.

(*b*) *Per* Lord Blackburn, *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas. p. 1206.

(*c*) *Per* Lord Penzance, *Radley* v. *London & North Western R. Co.*, (1876) 1 App. Cas. p. 759; see also the direction of Erskine, J., *Davies* v. *Mann*, (1842) 10 M. & W. p. 547.

(*d*) *Per* Parke, B., *Bridge* v. *Grand Junction R. Co.*, (1838) 3 M. & W. p. 248; and *per* Parke, B., *Davies* v. *Mann*, (1842) 10 M. & W. p. 548.

runs into another horse and cart standing in the middle of the street also unattended. The above statements, moreover, are open to the objection that they seem to imply that, in the cases to which the qualification applies, there are a succession of negligences in point of time, and that the party last negligent is the party really responsible; but it may be observed that if a man places his person or property in a position of danger, or establishes a state of things which is or may be dangerous to others, his negligence in so creating a source of danger to himself or others continues as long as that source of danger remains unremedied, that is to say, continues down to the very moment of the accident.

Again, the above statements of the qualification do not make it clear whether the responsibility of the party who is on the spot at the time of the accident is dependent or not upon his having actually become aware of the fact of the other party's negligence before committing the negligence which is charged against himself.

Cases where defendant aware of negligence of plaintiff.

In *Davis* v. *Mann* (*a*) the plaintiff carelessly left his donkey fettered on a highway, and the defendant's wagon coming along at an improper pace injured the donkey, which could not get out of the way. The judge directed the jury that if the accident might, notwithstanding the negligence of the plaintiff, have been avoided by the exercise of ordinary care on the part of the driver of the wagon, the defendant was responsible, and the jury having found for the plaintiff, that direction was upheld by the Court. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage on the wrong side of the road" (*b*). It does not appear clear from the facts of this case whether the driver saw the donkey at all before the accident happened, or if he did whether he saw it in sufficient time to allow of his pulling up his horses and avoiding it, but the above extract from the judgment seems to suggest that he did. In *Tuff* v. *Warman* (*c*), the plaintiff's

(*a*) (1842) 10 M. & W. 546.
(*b*) *Per* Parke, B., *ibid.* p. 549.
(*c*) (1858) 5 C. B. N. S. 573.

barge while being navigated down the river under sail by two men, neither of whom kept any look-out, was run into by the defendant's steamer coming up the river; the steamer had a look-out, but persisted in keeping her course until too late to avoid the collision. The defendant was held liable. Here, indeed, both parties were in motion at the moment of the accident, and the barge in one sense ran into the steamer, and therefore, if the steamer had had no look-out at all the defendant would, at common law, not have been liable; but the ground of the decision seems to have been that in view of the defendant's knowledge of the plaintiff's negligence the defendant was under the greater obligation to take care. These two cases seem to decide that not only does the mere fact of a plaintiff having been guilty of negligence in placing his person or property in a position of danger not make him "*caput lupinum*," so as to entitle others who are aware of the condition of things, wilfully to run into him with impunity, but that further, the defendant's knowledge of the plaintiff's negligence and of the consequent great risk of collision, coupled with his perception of the fact that the plaintiff is either absent from the spot, or being present, is not aware of the impending danger, or being both present and aware of it, has not the time or means to undo the effect of his previous negligence, imposes upon the defendant a greater obligation to take care than that which rests upon the plaintiff who has not the same knowledge or opportunities of avoiding the accident, and that the non-discharge of that obligation will make him the more culpable of the two; but they do not touch the question as to responsibility where the party on the spot has no knowledge of the other's negligence (*a*).

Cases where plaintiff ignorant of negligence of defendant.

The case of *Butterfield* v. *Forrester* (*b*), however, is an authority that where the plaintiff is the only party on the spot actual knowledge of the other's negligence is unnecessary, and that if the plaintiff's absence of knowledge is due to his own negligence that is enough to disentitle him. In that case the plaintiff whilst riding at an excessive speed in the street of a town rode against

(*a*) For a recent decision in which both parties were in motion and in which the defence of contributory negligence was successfully pleaded, see *Reynolds* v. *Tilling, Ltd.*, (1903) 20 T. L. R. 57, C. A.

(*b*) (1809) 11 East, 60.

a pole which the defendant had improperly put across the street and damaged himself, and it being proved that he might well have seen the pole and avoided it but for the excessive speed at which he was riding, it was held that he could not recover. There the plaintiff was the only party in motion at the time of the accident, but whether the same principle will apply where, the plaintiff being the only party on the spot, the defendant's property alone is in motion, as where a person standing in the middle of a road is run over by a driverless cart which he might have seen if he had kept his eyes open, there is no authority to show.

Cases where defendant ignorant of negligence of plaintiff.

It is further to be inferred from the decision of the House of Lords in *Radley* v. *London & North Western R. Co.* (*a*), that where the only party on the spot at the time of the accident was the defendant and he alone was in motion, in order to render him responsible it is not necessary that he should have had actual knowledge of the other's negligence, and that if it is only by reason of the defendant's own negligence that he had not that knowledge his ignorance will not excuse him. There the plaintiffs were possessed of a siding, connected with the defendants' railway, and of a bridge over the siding. Upon the siding was a truck of the plaintiffs, with a second truck loaded on the top of it, the joint heights of the two trucks being too great to allow of their passing under the bridge. The plaintiffs knew that the defendants would shortly be likely to deliver some more trucks on to their siding, the result of which might be to drive the loaded truck against the bridge and damage it, yet knowing this they omitted to unload the truck and therein were guilty of negligence. The defendants subsequently brought some more trucks of the plaintiffs on to the siding and pushed the loaded truck against the bridge. The engine-driver, feeling a resistance, instead of going to see what the cause was, forced the train forward and broke the bridge down. The judge at trial having omitted to direct the jury that if the driver could in the result by the exercise of ordinary care have avoided the accident the plaintiffs' negligence would not excuse the defendants, the House of Lords ordered a new trial, being of opinion that upon the facts stated there was evidence upon which the jury could so

(*a*) (1876) 1 App. Cas. 754.

find, notwithstanding that the driver had no actual knowledge of the state of affairs. But if actual knowledge of the fact of the plaintiff's negligence is not an essential ingredient of the defendant's liability, then in such cases as *Radley* v. *London & North Western R. Co.* the only distinction that can be drawn between the two parties, as regards their respective shares in the cause of the injury, is that one was in motion and the other was not. The ground of the defendant's liability in such a case is not that he was any more negligent than the plaintiff, for both were guilty of a want of ordinary care, and there was nothing in the facts to impose a greater obligation to exercise that care upon one party than upon the other; nor is it that the defendant's negligence was later in time than that of the plaintiff, for the negligence of the plaintiff in omitting to remove his person or property from its position of danger continued down to the moment of the accident just as much as did the defendant's omission to take care; it is simply that the latter being in motion was the one who actually did the damage. He is responsible who was the efficient cause. The principle so established leads to curious results; for instance if a driver of a cart being drunk or asleep suffers his cart to drive over a donkey lying in the road he will be liable; but, as it cannot make any difference, as regards the means of knowledge of the donkey being there, whether he be fast asleep in the cart or absent from the scene altogether, if he leaves his horse and cart unattended in the street and it starts off by itself and causes a similar accident, he ought equally to be liable. But whether the Court would go the length of so holding may well be doubted. Although in a recent case it has been held *primâ facie* evidence of negligence in its owner, for an unattended horse to bolt and cause damage in a public place during the day time (*a*).

Where the respective negligences are equal the party who was the efficient cause is responsible.

But a plaintiff whose injury has been partly caused by the negligence of the defendant will not be disentitled to recover by reason of the injury having been contributed to by his own act, unless such act also was negligent. Although under ordinary circumstances a plaintiff who places his person or property in a position of some degree of danger, or does any other act from which consequences injurious to him are not unlikely to flow, is

To disentitle plaintiff to recover his contributory act must be negligent.

(*a*) *Snee* v. *Durkie*, (1904) 6 F. 42, Ct. of Sess.

bound for his own protection to keep his eyes open and take proper precautions to guard against the occurrence of an accident, yet where he has been thrown off his guard by the conduct of the defendant, and reasonably induced to believe that he may do the act with safety, a less degree of care and circumspection is required of him. In such case the plaintiff's omission to take ordinary care does not amount to negligence. Thus, it being the duty of a railway company, where its line crosses a public highway on the level, to keep the gates closed when a train is approaching, a passenger along the highway who finds the gates open is reasonably entitled to assume that no train is approaching and that he may cross with safety (*a*), for the act of the company in leaving the gates open "amounts to a statement and a notice to the public that the line at that time is safe for crossing" (*b*). Similarly, although there may be no universal duty upon those in charge of a train to whistle on approaching a level crossing, still if the company have made a practice of so doing, and that practice is known to the plaintiff, the latter will, if he hears no whistle when he is about to cross the line, be justified in assuming that it is unnecessary for him to look about to see whether a train is coming (*c*). So, too, if the servants of a railway company expressly or impliedly invite a passenger to alight from a train at a particular spot, such invitation, if unaccompanied by any warning, is tantamount to a representation that the spot in question is a suitable one at which to alight, and the passenger, being entitled to expect that he will step on to a platform, is not bound to look so carefully to see where he is stepping as he would be if there had been no such invitation (*d*). Thus where a train, in the last carriage of which the plaintiff was, arrived at the terminus but drew up short of the buffers, and the portion of the platform opposite the plaintiff's carriage was bevelled off, leaving a space of eighteen inches between it and the carriage, and, the guard having opened the door without giving any warning

Plaintiff thrown off his guard by conduct of defendant.

Invitation to alight from train.

(*a*) *North Eastern R. Co.* v. *Wanless*, (1874) L. R. 7 H. L. 12.

(*b*) *Per* Lord Cairns, *ibid.* p. 15.

(*c*) See *per* Lord Cairns, *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas. p. 1155; and *per* Lord Esher, *Smith* v. *South Eastern R. Co.*, (1896) 1 Q. B. p. 183.

(*d*) See *per* Lord Selborne, *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas. p. 1193; *Bridges* v. *North London R. Co.*, (1873–4) L. R. 7 H. L. 213.

of the state of matters, the plaintiff fell in getting out, it was held that the conduct of the guard amounted to an intimation that the plaintiff could alight safely, and that the latter was entitled to recover (*a*).

Contributory negligence of children of tender years.

With reference to the question whether, in the case of a child of tender age, conduct on the part of such child contributing to an accident will preclude it from recovering under circumstances under which similar conduct would preclude a grown person from recovering, a distinction is to be drawn between cases in which the conduct of the child amounts to what in a grown person would be mere negligence, and those in which it amounts to intentional trespass. If a child is guilty of what in a grown person would be mere negligence and nothing more, as, for instance, where it is exercising a right of passage on a public way but in a careless manner, the question whether such conduct will afford a defence must depend on the age of the child. What is negligence in a grown person is not necessarily negligence in a child. Negligence means want of ordinary care, and "ordinary care must mean that degree of care which may reasonably be expected of a person in the plaintiff's situation" (*b*), which in the case of a very young child would be *nil*. Thus, in *Gardner* v. *Grace* (*c*), where a child, aged three and a half years, ran out into a road and was knocked over by the defendant's cart, Channell, B., at *nisi prius*, ruled that the defence of contributory negligence would not avail. So, also, in *Lay* v. *Midland R. Co.* (*d*), where a child, aged four, was crossing a railway bridge, over which there was a public right of way, but instead of walking upright sidled along with its back leaning against the fencing of the bridge, which consisted of open lattice-work, and fell through one of the openings in the lattice, the child was held entitled, notwithstanding its own conduct, to recover in respect of the insufficiency of the fencing, the Court (Pollock, B., *dub.*) being of opinion that what amounts to contributory negligence must in such case have reference to the age of the child (*e*).

(*a*) *Praeger* v. *Bristol and Exeter R. Co.*, (1871) 24 L. T. N. S. 105; and see *Glassock* v. *London, Tilbury & Southend Ry.*, (1902) 18 T. L. R. 295.

(*b*) *Per* Lord Denman, *Lynch* v. *Nurdin*, (1841) 1 Q. B. p. 36.

(*c*) (1858) 1 F. & F. 359.

(*d*) (1874–5) 34 L. T. N. S. 30.

(*e*) And see *Williams* v. *Great Western Ry.*, (1874) L. R. 9 Ex. 157.

Trespass of child of tender years.

Where, however, the child is guilty, not of mere carelessness in the doing of a lawful act, but of a wholly unlawful act such as a wilful and intentional trespass, such conduct will in all cases afford a defence irrespective of the age of the child. Thus in *Hughes* v. *Macfie* (*a*), where the defendant had raised his cellar-flap and reared it upright against the wall of his house and negligently left it in that position, and the plaintiff, aged seven wrongfully climbed upon the flap, and, in jumping off, brought the flap down upon itself, it was held that the plaintiff could not recover. So, too, in *Mangan* v. *Atterton* (*b*), where the defendant exposed in a public place a machine for crushing oilcake, unfenced, without being thrown out of gear, and without any person to watch it, and the plaintiff, aged four, returning from school in company with some other boys, at the suggestion of one of them put his fingers within the machine, whilst another turned the handle, and in so doing crushed the plaintiff's fingers, it was held that the plaintiff could not maintain an action. "The defendant," said Bramwell, B., "is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them." It is submitted, however, that if a tradesman were to paint toys with poisonous colour, and a child of tender years were to suck the paint on them, and sustain injury thereby the maker would be responsible. But a child who climbs up behind a carriage, and tumbles off upon the carriage being set in motion, cannot be heard to complain. The case of *Lynch* v. *Nurdin* (*c*), indeed, suggests the contrary. There, the defendant having left his horse and cart unattended in the street, the plaintiff, aged seven, climbed on to the back of the cart, and another boy made the horse move on, which caused the plaintiff to fall and be injured; the plaintiff was allowed to maintain his action. Although the authority of that case has been doubted (*d*), the more recent decisions in *Jewson* v. *Gatti*, (*e*) and *Harrold* v. *Watney* (*f*) seem to reaffirm the principle laid down therein to

(*a*) (1863) 2 H. & C. 744; and see *Devlin* v. *Jeffray's Trustees*, (1903) 5 F. 130, though in this case reparation might have been obtained from the lessee.

(*b*) (1866) L. R. 1 Ex. 239.

(*c*) (1841) 1 Q. B. 29.

(*d*) *Per* Alderson, B., *Lygo* v. *Newbold*, (1854) 9 Exch. p. 305.

(*e*) (1886) 2 T. L. R. 381, 441.

(*f*) (1898) 2 Q. B. 320, C. A.

this extent, viz., that when the *mediate* cause of the accident is an act of negligence in the nature of a nuisance, the mere fact that the *immediate* cause is such an undue user of the defective article, or insufficiently guarded place, as to amount to an act of contributory negligence, will not necessarily disentitle the aggrieved party to recover for the damage he has sustained by reason of such initial non- or misfeasance on the part of the defendant.

This distinction between negligence and trespass may occasionally run somewhat fine. For instance, if the plaintiff in *Lay* v. *Midland R. Co.* (*a*) had, as suggested by Bramwell, B. (*b*), when the case was before the Court on a former occasion, intentionally crept through the lattice to a point where he had no right to be and then tumbled down, he probably could not have maintained his action.

Contributory negligence to afford defence must be that of the plaintiff himself or of his servants, whom he has selected from his knowledge or belief in their care or skill: the contributory negligence of a third person, not being the servant of the plaintiff, will not suffice. Thus, where a collision occurred between two vessels by the fault of both, the representatives of a passenger on board one of the vessels, who was drowned in consequence, were held entitled to recover against the owners of the other, the persons in charge of the carrying vessel not being the servants of the deceased passenger (*c*). So, too, the negligence of a pilot whom the ship-owner is compelled to take is not imputable to the ship-owner (*d*); therefore, where a collision occurs between two vessels by the fault of both, and both are damaged, the one being under the charge of a compulsory pilot and the other not, the former may recover half her damage without any deduction in respect of the damage suffered by the other ship (*e*).

Contributory negligence to afford defence must be that of plaintiff or his servants.

It was formerly thought that in the case of the carriage of persons in trains or stage-carriages the passenger, by selecting the particular conveyance, was so far identified with the person in charge of it as to render him responsible for any contributory

Doctrine of identification of passenger in vehicle with party in charge of it exploded.

(*a*) (1874–5) See above, p. 507.
(*b*) (1874) 30 L. T. N. S. p. 530.
(*c*) *The Bernina*, (1887–8) 12 P. D. 58; 13 App. Cas. 1.
(*d*) *Spaight* v. *Tedcastle*, (1881) 6 App. Cas. 217.
(*e*) *The Hector*, (1883) 8 P. D. 218.

negligence on the part of such person, so that in the event of a collision with the train or stage-carriage of another company contributed to by the negligence of the person in charge of the plaintiff's conveyance, the plaintiff was precluded from recovering against the other company in respect of any injuries he might have sustained from such collision (*a*), but that doctrine has now been finally overruled (*b*). But a child of tender years, who is unable to look after himself, is to be treated as identified with the person in whose charge he is, so as to disentitle him to recover for an accident contributed to by the negligence of such person (*c*), and this principle will, apparently, absolve the defendant, not merely where he is charged with a breach of a contractural duty to take care, but also where he is an independent wrongdoer (*d*).

Child of tender years identified with person in charge of him.

Upon the issue of contributory negligence the burden of proof at the commencement of the trial is upon the defendant (*e*), and the plaintiff is not bound in the first instance to give any evidence to negative the existence of it (*f*).

On issue of contributory negligence burden of proof lies on defendant.

In considering the question whether the issue of contributory negligence is one which, when tried before a jury, it is under any circumstances competent for the judge to decide in the defendant's favour without the intervention of the jury; and upon which so deciding he may nonsuit the plaintiff; it must be borne in mind that the issue of contributory negligence and that of the "*per quod*" are wholly distinct and independent, the former being "an issue which does not arise until the defendant's negligence and its relation to the accident have been first established, and which in the absence of that conclusion is

Issue of contributory negligence distinct from that of the "*per quod*.'

(*a*) *Thorogood* v. *Bryan* (1849) 8 C. B. 115; *Armstrong* v. *Lancashire & Yorkshire R. Co.*, (1875) L. R. 10 Ex. 47.

(*b*) *Mills* v. *Armstrong; The Bernina*, (1888) 13 App. Cas. 1.

(*c*) *Per* Williams, J., (1859) *Waite* v. *North Eastern R. Co.*, E. B. & E. p. 734.

(*d*) *Per* Lord Esher, M.R., *The Bernina*, (1887) 12 P. D. p. 73.

(*e*) *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas., *per* Lord Hatherley, p. 1169, an *per* Lord Penzance, p. 1176; *Wakelin* v. *London & South Western R. Co.*, (1886) 12 App. Cas., *per* Lord Watson, p. 47.

(*f*) Lord Esher has indeed uniformly held the contrary (see *Gee* v. *Metropolitan R. Co.*, (1873) L. R. 8 Q. B. p. 174; *Bridges* v. *North London R. Co.*, (1873-4) L. R. 7 H. L. p. 232; *Davey* v. *London & South Western R. Co.*, (1883) 12 Q B. D. p. 71; *Wakelin* v. *London & South Western R. Co.* (1886) 12 App. Cas. p. 43, but he seems to be the only judge in this country who has supported that doctrine

immaterial to the case" (*a*). Where it is established that the damage has been brought about by the joint negligence of both parties, the plaintiff fails because, both parties having been in the wrong, *in pari delicto potior est conditio defendentis* (*b*). It is no doubt difficult to reconcile this view with the old practice of pleading, according to which contributory negligence was pleaded under the general issue. But it is submitted that the practice was in this respect inaccurate. The doctrine that the plaintiff's negligence destroys the causal connection between the defendant's negligence and the injury leaves no room for any meaning to be given to the word "contributory," and is open to question (*c*). If, indeed, that doctrine were right, it would follow that upon an indictment for manslaughter by the negligence of the prisoner, the contributory negligence of the deceased would afford a good defence, but the weight of authority is in favour of the view that it would not (*d*).

On the issue of the "*per quod*" judge may nonsuit.

Where, indeed, the plaintiff admits some fact which necessarily goes to negative the "*per quod*," as for instance where a person, who has been knocked down upon the level crossing of a railway by a train which neglected to whistle, admits that he is stone deaf, and therefore could not have heard the whistle even if it had been sounded, or admits that notwithstanding the omission to whistle he saw the train coming before he stepped upon the line, the judge may undoubtedly nonsuit, but in such cases the *negligent* character of the plaintiff's conduct does not come in question. Whether it be negligent or not it is not the cause of the damage in respect of which the action is brought.

Whether on issue of contributory negligence judge can ever nonsuit.

Whether, however, upon the issue of *contributory negligence* the judge is ever at liberty to nonsuit is a question upon which there has been much difference of opinion.

On the one hand it has been said that the issue of contributory

(*a*) *Per* Lord Penzance, *Dublin, Wicklow, &c., R. Co.* v. *Slattery*, (1878) 3 App. Cas. p. 1178.

(*b*) "In equal fault the position of defendant is the stronger." *Per* Lord Halsbury, *Wakelin* v. *London & South Western R. Co.*, (1886) 12 App. Cas. p. 45.

(*c*) For statutory provisions see 41 & 42 Vict. c. 16, s. 82, and *Blenkinsop* v. *Ogden*, (1898) 1 Q. B. 783.

(*d*) *Per* Pollock, C.B., *Reg.* v. *Swindall*, (1846) 2 C. & K. 230; *per* Lush, J., *Reg.* v. *Jones*, (1870) 11 Cox. 544; *per* Byles, J., *Reg.* v. *Kew*, (1872) 12 Cox, 355; but see *per* Willes, J., *contra*, *Reg.* v. *Birchall*, (1866) 4 F. & F. 1087.

negligence, being an affirmative issue lying on the defendant, cannot be determined in the defendant's favour except by the verdict of the jury, for though according to the rule in *Ryder* v. *Wombwell* (*a*), where there is no reasonable evidence in support of the affirmative of an issue, the judge may decide the negative for himself, he cannot *e converso* where the evidence is conclusive in favour of the affirmative decide the affirmative for himself. It has accordingly been argued that although the plaintiff may admit acts or omissions which irresistibly point to a want of proper care on his part, yet as the question whether such acts or omissions do or do not amount to negligence is a question of fact, and as that fact is never admitted, the issue cannot be withdrawn from the jury, since *ad quæstionem facti non respondent judices* (*b*); and that wherever, therefore, there is evidence of negligence on the part of the defendant conducing to the accident, upon which evidence, apart from any consideration of the character of the plaintiff's conduct, the jury might not unreasonably find a verdict for the plaintiff, the judge can never nonsuit. This was the view entertained by the majority of the House of Lords in the case of *Dublin, Wicklow, &c., R. Co.* v. *Slattery* (*c*).

On the other hand, it has been said that where upon the uncontradicted evidence the inference in favour of the affirmative of an issue is irresistible the *onus* of proof is shifted, and if no reasonable evidence be then offered in support of the negative the judge may find the affirmative to be proved; and that, although according to the rule laid down in *Ryder* v. *Wombwell* (*d*), the judge ought only to withdraw the case from the jury in the event of there being no evidence "on which the jury could properly find the question for the party on whom the *onus* of proof lies," yet the expression "the party on whom the *onus* of proof lies" means "not the party on whom it lay at the beginning of the trial (*e*), but the party on whom, on the undisputed facts, it

(*a*) (1868) L. R. 4 Ex. 32.

(*b*) "Questions of fact are not for the Court."

(*c*) (1878) 3 App. Cas. 1155, *per* Lord Cairns, pp. 1167: *per* Lord Selborne, p. 1189; *per* Lord Penzance, p. 1176; *per* Lord O'Hagan, p. 1182; and *per* Lord Gordon, 1217.

(*d*) (1868) L. R. 4 Ex. p. 38.

(*e*) Who on the issue of contributory negligence is the defendant; see above, p. 510.

lay at the time of the direction given" (*a*). And it has therefore been contended that where the facts of the plaintiff's conduct are admitted, the question whether that conduct amounts to negligence is a question of fact for the jury only where it is open to doubt whether the inference of negligence ought to be drawn, but that where the inference is irresistible it becomes one of law for the judge. This was the view taken by Lords Hatherley and Blackburn in *Dublin, Wicklow, &c. R. Co.* v. *Slattery* (*b*), by Brett, M.R., in *Davey* v. *London & South-Western R. Co.* (*c*), and by Lords Watson, Blackburn and Fitzgerald in *Wakelin* v. *London & South-Western R. Co.* (*d*).

This, no doubt, is much the more convenient doctrine, for it avoids the necessity of an application to the Court of Appeal to do that which, according to the opposite view, the judge at the trial had no power to do (*e*). The expressions of opinion, however, by the Lords in *Wakelin* v. *London & South-Western R. Co.* were merely *obiter dicta*, and so far as the cases now stand, the weight of authority is the other way.

Volenti non fit injuria.

Closely connected with the subject of contributory negligence is the rule that where a source of danger has been brought about by the wrongful act or omission of the defendant, a person who is injured in consequence of coming into contact with that source of danger cannot be heard to complain if he voluntarily came into such contact with full knowledge of the danger and courted the consequences. *Volenti non fit injuria.*

(*a*) *Per* Lord Blackburn, (1878) 3 App. Cas. p. 1209.

(*b*) (1878) 3 App. Cas. pp. 1169, 1209.

(*c*) (1883) 12 Q. B. D. 70.

(*d*) (1886) 12 App. Cas. 41.

(*e*) In *Millar* v. *Toulmin*, (1886) 17 Q. B. D. 603, it was held that the Court of Appeal, on an appeal from the order of a Divisional Court on an application for a new trial, had power under Order LVIII. r. 4, to draw inferences of fact, although inconsistent with the finding of the jury, and to enter judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. On appeal to the House of Lords the judgment of the Court of Appeal in that case was reversed on the facts, but Lord Halsbury expressed strong doubts whether Order LVIII. r. 4, gave any such jurisdiction as that which the Court had claimed to exercise. In *Allcock* v. *Hall*, (1891) 1 Q. B. 444, however, the Court of Appeal, notwithstanding Lord Halsbury's doubts, adhered to their original view, and held further that the power so given to them by that rule was not taken away by Finlay's Act (53 & 54 Vict. c. 44), under which applications for new trials are made directly to the Court of Appeal, and not in the first instance to the Divisional Court.

That maxim, of course, must not be interpreted literally, for no man ever voluntarily courts a certain injury; the utmost anyone does is to run a risk which may or may not result in injury. It can only be understood to mean that a plaintiff who voluntarily courts a risk cannot afterwards complain if he is hurt.

But the great difficulty in applying the maxim lies in determining what is meant by "*volenti.*" Under what circumstances is a man to be said to court a risk voluntarily? It has been indeed said that "the maxim is not '*scienti non fit injuria*,' but '*volenti*'" (*a*). But that *dictum* must not be understood to mean that, in cases in which the plaintiff has run a risk of injury from a source of danger created or permitted by the defendant, the plaintiff's full knowledge of the extent of the risk can never of itself afford a complete answer to the action. There are many cases in which, when once it is admitted that the plaintiff knew the risk he was running, it is unnecessary to inquire further whether his conduct in so running it was voluntary (*b*). In the absence of any contract by the plaintiff to take the risk of injury upon himself, any distinction between the voluntary running of a risk and the full knowledge of existence is material only in cases in which there is a positive duty upon the defendant as towards the plaintiff not to create or permit the existence of the particular source of danger.

Cases where plaintiff's knowledge of the danger is of itself sufficient to afford a defence.

But there are many cases in which there is no such duty. For instance, if A. lends B. a gun of which one of the barrels is to A.'s knowledge defective, and A. informs him of that fact, A.'s duty in respect of it is at an end; and if after that information B. chooses to use the defective barrel he does so at his peril. Again at common law there is, in respect of private premises (at all events where they are not immediately adjacent to a high road), no positive duty towards persons, coming there by the license of the owner, not to permit the existence of a source of danger upon them; the only duty of an owner of private premises, even as towards persons coming there on business, being to warn them of the existence of any non-apparent source of danger,—if the source of danger is perfectly apparent the owner

(*a*) *Per* Bowen, L.J., *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. p. 696.

(*b*) See *Giles* v. *London County Council*, (1904) 2 L. G. R. 326.

is under no duty to do anything, and if it is non-apparent the moment he has given warning of its existence his duty is at an end (*a*). In such cases the knowledge of the plaintiff is of itself a complete answer to an action. Such knowledge is an answer, because in the defendant's conduct in permitting the existence of the danger there is under the circumstances nothing wrongful (*b*). But the owner where the danger is non-apparent will not get rid of his duty by merely publishing a general notice of that danger; he must bring it home to the mind of the plaintiff; there must be actual knowledge, reasonable means of knowledge is not enough. Thus, where the plaintiff came upon business on to the defendant's premises and was bitten by the defendant's dog, which was chained up in the yard, against the palings of which was a notice "Beware the dog," painted in letters three inches long on a board, it was held that, as the plaintiff was unable to read, the fact of the notice did not disentitle him to recover (*c*). Further, to constitute such knowledge of the danger as will afford a defence, it is not enough that the plaintiff should know that there is some degree of risk; he must appreciate the full extent of it; "there may be a perception of the existence of the danger without comprehension of the risk" (*d*). This rule, that at common law the duty of the owner in the case of private premises is discharged by giving warning, applies as well towards servants as towards other licensees (*e*). It has been held that

(*a*) See above, pp. 481, 489.

(*b*) *Per* Bowen, L.J., *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. p. 696.

(*c*) *Sarch* v. *Blackburn*, (1830) 4 C. & P. 297; and see *per* Bayley, J., *Ilott* v. *Wilkes*, (1820) 3 B. & Ald. p. 313.

(*d*) *Per* Bowen, L.J., *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. p. 696. If a person places in the hands of another a complicated and dangerous machine, with the nature of which that other is unacquainted, the former does not discharge his duty by merely informing him generally that it is dangerous and requires care in using, he must go further and explain the details of the danger. See, too, *Indermaur* v. *Dames*, (1866) L. R. 1 C. P. p. 276.

(*e*) *Williams* v. *Clough*, (1858) 3 H. & N. 258; *Griffith* v. *London & St. Katharine Dock Co.*, (1884) 13 Q. B. D. 259. But see Workmen's Compensation Acts, 1897 and 1900. In cases arising under the Employers' Liability Act, 1880, the employer will discharge his duty by bringing fully home to the mind of the workman the dangerous nature of the premises, for under that Act workmen are placed in the same position as strangers coming on business. See *per* Bowen and Fry, L.JJ., in *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. pp. 694, 703. As to the duty towards strangers, see above, pp. 481 *sqq.*

there is a common law duty, even as towards trespassers, not to create, without notice, a source of danger on private premises with the intent of thereby causing grievous bodily harm to persons trespassing there (*a*); but if notice of the danger be brought home to the plaintiff the duty as towards him is discharged, and he consequently cannot recover (*b*).

In all these cases where upon the admitted facts the only inference open is that the plaintiff had full knowledge of the nature and extent of the danger there is nothing further to inquire into, and the judge is bound to nonsuit (*c*). But as in the majority of cases the admitted facts allow of more inferences than one, the question whether the plaintiff had such full knowledge must in general be submitted to the jury.

The actual decision in *Smith* v. *Baker* (*d*), does not in any way contravene the proposition stated above. And though Lord Herschell there expressed disapproval of *Thomas* v. *Quartermaine*, Lord Morris approved it. It is submitted that *Thomas* v. *Quartermaine* was rightly decided. The plaintiff's case must rest upon negligence, and to entitle him to have the case submitted to a jury he must give *some* evidence of negligence. But if the defendant's duty in respect of his premises is alternative, namely, either to have them safe or to give warning of their unsafety where it is not apparent, a plaintiff who merely proves a danger which is perfectly apparent gives *no evidence* of any negligence at all. The whole question therefore turns on whether the defendant's duty is so alternative, and it is submitted that the cases above cited (p. 482) clearly establish that it is.

Cases where mere knowledge of the danger is not sufficient.

But there exists at common law a positive duty not to permit the existence of a danger in a place to which there is an absolute right of access, such as a highway, or a market-place, or a railway station, and in such case notice to the plaintiff, however ample, and however clearly it may bring home the extent of the danger to his mind, does not get rid of the duty towards him. He is entitled, in preference to foregoing the exercise of his rights, to

(*a*) *Bird* v. *Holbrook*, (1828) 4 Bing. 628; but the existence of such duty has been doubted; see *Jordin* v. *Crump*, (1841) 8 M. & W. p. 789. See above, pp. 154 *sqq*.

(*b*) *Ilott* v. *Wilkes*, (1820) 3 B. & Ald. 304.

(*c*) *Thomas* v. *Quartermaine*, (1887) 18 Q. B. D. 685.

(*d*) (1891) A. C. 325.

run the risk which the defendant's wrongdoing has occasioned, provided that the risk be not so serious as to be altogether out of proportion to the benefit to be secured. Thus where the defendants had wrongfully made a dangerous trench in the only outlet from a mews, leaving only a narrow passage upon which they heaped rubbish, which passage was not guarded by any proper fence, and the plaintiff, a cabman, attempted in the exercise of his calling to lead his horse out over the rubbish, whereupon the horse fell into the trench and was killed, it was held that, as the danger was not "so great that no sensible man would have incurred it," the plaintiff was entitled to recover (*a*). So, where the defendants, the owners of a cattle-market, maintained in the market-place a spiked railing so low as to be dangerous to cattle resorting to the market, it was held that the plaintiffs, who brought to the market a cow, which, in attempting to jump the railing was killed, were entitled to recover although the danger of the railing was perfectly open and apparent (*b*). It is on this same ground also that the case of *Osborne* v. *London & North-Western R. Co.* (*c*) may be rested. There the plaintiff, a season-ticket holder on the defendants' line, was injured by falling down some steps in the defendants' railway station, which steps the defendants suffered to be slippery and dangerous owing to their being caked with snow. The plaintiff was held entitled to recover although he admitted that he saw the steps were dangerous. In this case the Divisional Court indeed seem to have gone upon the ground that the plaintiff's admission only went to show that he had *some* knowledge of the danger, not that he knew the full extent of the danger. But it is submitted that the case may be also rested upon the wider ground above mentioned. Had the plaintiff's comprehension of the risk been ever so complete, it is apprehended that that would not under the circumstances have availed the defendants. That comprehension would not have got rid of the defendants' duty. The plaintiff would still have been entitled to attempt to descend the steps and to look to the defendants for the consequences, for there would have

(*a*) *Clayards* v. *Dethick*, (1848) 12 Q. B. 439.

(*b*) *Lax* v. *Corporation of Darlington*, (1879) 5 Ex. D. 28.

(*c*) (1888) 21 Q. B. D. 220.

been nothing in the condition of things to make the attempt altogether unreasonable. A railway station is not like a private shop into which members of the public have no absolute right to go. Everyone who desires to travel by train has an absolute right to go into a railway station. For a railway company are common carriers of passengers in the sense that they are bound to carry everyone who applies (*a*). Such a station, although in one sense private premises, is for this purpose much more like a public highway.

In the recent case of *Fraser* v. *Caledonian R. Co.* (*b*), it was held by the Court of Session that the plaintiff was entitled to sue the defendants for personal injuries occasioned by reason of the railway company:—

(1) Failing to provide a sufficient staff of servants for the requirements of their business:

(2) Negligently permitting the overcrowding of a platform by intending passengers.

Again, a duty not to permit the existence of a danger exists in certain cases by statute, even in respect of private premises, such, for instance, as the duty imposed on the owner of machinery to fence it (*c*), or of a mine-owner to have a banksman constantly in attendance at the pit's mouth (*d*), in which cases, though the plaintiff has full notice of a breach of the duty, the duty nevertheless remains. Again, where a duty exists by contract, the effect of a breach of it is not got rid of by the plaintiff's knowledge of the condition of things which that breach has brought about. Thus if a railway train overshoots the platform so as to bring the carriage in which the plaintiff is being carried as a passenger opposite to a spot at which it is more or less dangerous to alight, and those in charge of the train do not put back, the company have committed a breach of their contract of carriage, and the plaintiff, though he may see the full extent of the danger, is not, unless the danger is very great, bound to let himself be carried beyond his destination, but may run a reasonable degree of risk in attempting to alight, and, if he suffers damage in so doing, look

(*a*) *Denton* v. *Great Northern Ry.*, (1856) 5 E. & B. 860.

(*b*) (1903) 5 F. 41, Ct. of Sess.

(*c*) *Clarke* v. *Holmes*, (1862) 7 H. & N. 937.

(*d*) *Baddeley* v. *Earl Granville*, (1887) 19 Q. B. D. 423.

to the company for compensation (*a*). And in such or cognate circumstances, damages are recoverable for nervous shock occasioned by fright, even when there may be little or no perceptible injury resulting from the actual impact (*b*).

Different meanings of term "*volenti*."

It seems then that in the application of the maxim *Volenti non fit injuria* to the two classes of cases above discussed, the word "voluntary" is used in two wholly different senses. As applied to the first class, in which the defendant's duty is discharged by giving sufficient warning of the danger, the statement that the plaintiff's conduct in incurring the risk was voluntary, means (in the absence of a contract to hold the defendant harmless for the consequences) nothing more than that he had such a complete knowledge of the nature and extent of the risk as to negative the existence of any breach of duty on the part of the defendant. As applied to the second class, in which the defendant's duty is not discharged by giving warning, the phrase means that the plaintiff, though entitled to run some degree of risk in order to avoid the consequences of the defendant's wrong-doing, in fact ran a risk of a greater degree than was under the circumstances of the case reasonable. In this latter context the defence embodied in the maxim is nothing but a branch of the defence of contributory negligence.

Where plaintiff contracts to take risk on himself.

But there is yet a third sense in which the word "voluntary" has been used in connection with the application of the maxim now under discussion. In cases in which there is a contractual relation between the parties, such as that of employer and employed, the defendant has frequently sought to shelter himself under the maxim on the ground that the plaintiff has expressly or impliedly agreed, as one of the terms of his contract with the defendant, that in the event of his being injured by the defendant's act of omission, he will hold the defendant harmless for the consequences. The source of danger in connection with which the plaintiff may run a risk of injury may be one or other of two

(*a*) *Per* Brett, J., *Adams* v. *Lancashire & Yorkshire R. Co.*, (1869) L. R. 4 C. P. p. 744.

(*b*) *Cooper* v. *Caledonian Ry.*, (1902) 4 F. 880, Ct. of Sess.; *Dulieu* v. *White*, (1901) 2 K. B. 669. For an interesting comparison between *Dulieu* v. *White*, and the decision of the Privy Council in *Victorian Ry. Commissioners* v. *Coultas*, ((1888) 13 App. Cas. 222), see "Singtон on Negligence," pp. 35 *sqq*.

kinds: first, it may consist in an existing dangerous condition of things, by bringing himself into contact with which the plaintiff injures himself, as where he walks into an unfenced hole in a floor, or handles to his damage defective machinery or plant, in which cases the last act preceding the injury is the act of the plaintiff himself; secondly, the source of danger may consist in the likelihood (owing to a course of conduct on the part of the defendant known to the plaintiff) that a positive act may be done *in futuro* which may directly injure the plaintiff, in which cases the last act preceding the injury is the act of the defendant, or of those for whom he is responsible. The defence that the plaintiff's act was voluntary in the sense above mentioned, namely, that he contracted to take the risk of injury upon himself, is applicable to cases of risks run in connection with both the above kinds of sources of danger, but it is more important in connection with the latter; for in such latter cases it is only as evidence of the existence of such a contract that knowledge on the part of the plaintiff of the source of danger can be material. If it were otherwise, and if mere knowledge of the dangerous course of conduct would suffice to relieve the defendant of responsibility for his acts, that defence would be applicable just as much where the plaintiff was a stranger as where he was a person standing in a contractual relation towards the defendant; and it seems clear that a stranger, who knows the defendant to be habitually negligent in a particular matter, could not merely by reason of such knowledge be held to go at his peril into the neighbourhood of the spot where the defendant is conducting the negligent operations. To use the illustration put by Mellish, L.J., in *Woodley* v. *Metropolitan District R. Co.* (*a*), if a street scraper, who is employed to scrape a particular street, has had for a fortnight the opportunity of observing that a particular cabman drives his cab with very little regard for the safety of the men engaged in scraping the streets, and at the end of that time is negligently run over by the cabman it does not lie in the cabman's mouth to say, "You know my style of driving; you have seen me drive for a fortnight; I was only driving in my usual style." In that case the defendants employed an independent contractor to do certain work in a tunnel

(*a*) (1877) 2 Ex. D. p. 394.

belonging to them. The plaintiff, a servant of the contractor, was engaged on the work in the tunnel, which was dark and rendered dangerous by the frequent passing of the defendants' trains, and after he had been working there for some time with full knowledge that the defendants were taking no precautions for his protection, he was negligently injured by a passing train. It was held by the Court of Exchequer, and by Mellish and Baggallay, L.JJ., in the Court of Appeal, that the railway company were responsible (*a*).

But the question whether in any case the plaintiff has contracted to hold the defendant harmless for injury resulting from his wrong-doing, is a question of fact not of law, and must invariably be submitted to the jury. In *Smith* v. *Baker* (*b*) the plaintiff was employed by the defendants to drill holes in a rock cutting near a crane, which was being used for the purpose of raising stones. The crane was periodically swung round with stones over the plaintiff's head without warning. The plaintiff was aware of the danger arising from the practice of omitting to give warning, and had so worked for months when a stone fell and injured him. It was held by the House of Lords that the mere fact of the plaintiff having remained on in the defendant's service with knowledge of the dangerous practice did not as matter of law preclude him from recovering, and that it was a question for the jury whether he had contracted to take the risk of accidents upon himself. So too in *Yarmouth* v. *France* (*c*), where the plaintiff, who was in the employment of the defendant, was required by the defendant's foreman, notwithstanding his remonstrance, to drive a horse which he knew to be vicious, and while driving it was injured by the horse kicking him, it was held to be a question for the jury whether the plaintiff, in driving the horse after knowledge of its vice, had taken the risk upon himself.

(*a*) *Woodley* v. *Metropolitan District R. Co.*, (1877) 2 Ex. D. 384. It is true that in this case the majority of the Court of Appeal (Cockburn, C.J., Mellor and Grove, JJ.) held otherwise. But in the later case of *Membery* v. *Great Western R. Co.*, (1889) 14 App. Cas. 179, Lords Halsbury and Herschell were evidently of opinion that the view of Mellish, L.J., was to be preferred. In *Woodley's case* Mellish, L.J., lays stress on the fact that there was no contractual relation between the plaintiff and the defendants.

(*b*) (1891) A. C. 325.

(*c*) (1887) 19 Q. B. D. 647.

But although the fact of the plaintiff continuing in the defendant's employment after the knowledge of the danger is not conclusive of his having agreed to take the risk upon himself, it is an element for the jury to consider in determining the question whether he did so agree.

It has indeed been suggested in some of the cases that if the source of danger comes into existence *after* the plaintiff entered upon the defendant's employment, that fact will be a further element in determining whether his conduct in running the risk was voluntary (*a*); for it has been said that the master has no right to put the servant to the alternative of running the risk without compensation or quitting the employment, and that the servant, having under the circumstances practically no choice, may reasonably run some degree of risk in preference to abandoning the service (*b*). But there seems to be no substantial reason for drawing any distinction in this respect according as the source of danger comes into existence before or after the commencement of the employment. If a workman is to be heard to say that he could not afford to quit an employment which he had already entered, he must equally be entitled to say that he could not afford to forego the opportunity of entering a service which he knew to be dangerous before he entered it. If poverty does not take away a man's freedom of action in the one case, neither can it be held to do so in the other. The scope of the maxim *volenti non fit injuria*, has, however, been much circumscribed by the Workman's Compensation Acts, 1897, 1900, the effect of recent legislation being materially to increase the obligation of the employer of labour towards the employed, the former being no longer able to divest himself of liability in cases of accident by pleading the acquiescence of the latter (*c*).

(*a*) *Clarke* v. *Holmes*, (1862) 7 H. & N. 937; *Yarmouth* v. *France*, (1887) 19 Q. B. D. 647.

(*b*) See judgment of Pollock, C.B., in *Clarke* v. *Holmes*, (1862) 30 L. J. Ex. p. 139, and of Cockburn, C.J., and Byles, J., in Exch. Ch. (31 L. J. Ex. pp. 358, 361).

(*c*) See *ante*, pp. 95 *sqq*.

CHAPTER XVI.

FRAUD.

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A PERSON who causes another to injure himself is, under certain circumstances, liable for the injury to the same extent as though he had directly inflicted it. One way in which a person may cause another to injure himself is by making a false representation to such person, whereby he, acting upon the faith of the representation being true, suffers damage (*a*). The inquiry as to the circumstances under which an action for damages for an injury so inflicted, commonly called an action of deceit, will lie, forms the subject of the present chapter.

The representation must be of a past or existing fact.

In the first place the misrepresentation which is necessary to found an action of deceit must be a representation as to a past or existing fact.

Misrepresentation of intention.

It has been sometimes stated that a misrepresentation as to a person's intention will not suffice, but that view seems to be mistaken. "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else" (*b*). Therefore, where directors issued a prospectus inviting subscriptions for debentures, stating that the object of the loan was to enable them to enlarge their trade premises and purchase

(*a*) Another way of causing persons to injure themselves, namely, that of negligently creating a source of danger, with which such persons in ignorance of the danger bring themselves into contact to their damage, has already been dealt with in the preceding chapter. In connection with that class of injury the action for negligence and that for deceit will necessarily to some extent overlap, it being optional with the plaintiff in some cases whether he will frame his action in the one form or in the other.

(*b*) *Per* Bowen, L.J., *Edgington* v. *Fitzmaurice*, (1885) 29 Ch. D. p. 483.

additional plant, whereas in fact the object was to enable them to meet pressing liabilities, it was held that the misstatement of the purpose to which they intended to devote the money was sufficient to found an action of deceit (*a*). The great difficulty of proving what the defendant's actual intention was at the time of the statement made has indeed caused the criminal Courts to hesitate to treat a misstatement of intention as sufficiently a statement of fact to found an indictment for false pretences (*b*), though they have in recent times gone a long way in the direction of holding that it is so (*c*). The Companies Act, 1900 (*d*), alike defines and enhances the responsibilities of promoters and directors for false and fraudulent statements made in relation to companies, it being a misdemeanour punishable either summarily or by indictment for any person wilfully to make a statement, false in any material particular, knowing the same to be false, respecting any balance sheet, return, report, certificate, or other document relating to the affairs of a company (*e*). It is also a misdemeanour, within s. 84 of the Larceny Act, 1861 (*f*), punishable, as a maximum, with seven years' penal servitude, for any director, manager, or public officer of a company, to issue or concur in issuing any written statement or account (including a balance sheet) with intent to deceive or defraud shareholders (*g*).

To the rule, however, that a misstatement of intention will be

(*a*) *Edgington* v. *Fitzmaurice*, (1885) 29 Ch. D. 459. In *Jorden* v. *Money*, (1854) 5 H. L. C. 185, the obligee of a bond having represented to the obligor that it was her intention not to enforce payment of it, *she in fact having that intention at the time that she made the representation*, the obligor on the faith of such representation entered into engagements which altered his position. The obligee subsequently changed her mind and sought to enforce her claim. The obligor then sued for an injunction to restrain her from so doing, but the House of Lords dismissed the bill on the ground that the representation of intention did not amount to a contract, and that there had been no misrepresentation of fact which could create an estoppel. And see *Chadwick* v. *Manning*, (1896) A. C. 231, P. C. at p. 238.

(*b*) *Rex* v. *Goodhall*, (1821) R. & R. 461.

(*c*) *Reg.* v. *Cooper*, (1877) 2 Q. B. D. 510. And in *Reg.* v. *Gordon*, (1889) 23 Q. B. D. p. 360, Wills, J., expressed himself to be unable to see why a misrepresentation as to a person's intention should not be capable of supporting an indictment, though it was unnecessary in that case to decide the point.

(*d*) 63 & 64 Vict. c. 48.

(*e*) The doctrine of non-contribution between tort-feasors is expressly avoided by statutory enactment in the case of liabilities incurred, by the directors of companies, through making fraudulently untrue statements (*Gerson* v. *Simpson*, (1903) 2 K. B. 197, C. A.).

(*f*) 24 & 25 Vict. c. 96.

(*g*) *Rex* v. *Whitaker Wright*, (1904) Times Newspaper, Jan. 27th.

sufficient, there is an exception where the parties stand in the relation of vendor and purchaser, in which case a misstatement as to the highest price which the one party has it as his intention to give, or the lowest price which the other has it as his intention to accept, will not afford a cause of action (*a*). As the object of such misstatement is undeniably to deceive, the exception must be regarded as somewhat anomalous, and the only explanation seems to be, that it is so customary for persons standing in that relation to tell falsehoods of that description that no reasonable person ought ever to be deceived by them, and it is the party's own fault if he is. The purchaser is not bound to disclose the highest price he chooses to give, but is "at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase" (*b*). Indeed, it has been said that persons standing in the position of vendors or purchasers may with impunity make certain kinds of misstatements as to which there can be no question but that they are misstatements of fact. "An action of deceit cannot be maintained against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the purchaser was thereby induced to purchase it and was deceived in the value (*c*). If that be law it would seem clear that the exemption from liability for the species of deception now under discussion does not depend upon any supposed distinction between a statement of intention and a statement of fact. It is, however, actionable, and indeed punishable under the criminal law, for a person to effect a sale of goods, by wilfully and fraudulently making a misrepresentation to the buyer as to the nature of a chattel in specie (*d*).

Exception in the case of vendor and purchaser.

As with intention so with opinion; the question whether a man does or does not entertain a particular opinion is a question of fact. An expression of opinion not honestly entertained, and intended to be acted upon, cannot be regarded otherwise than as a fraud (*e*). The obstacle in the way of maintaining an

Misstatement of opinion.

(*a*) *Vernon* v. *Keys*, (1810–12) 12 East, 632; in Exch. Ch. 4 Taunt. 488.

(*b*) *Per* Mansfield, C.J., *Vernon* v. *Keys*, (1812) 4 Taunt. p. 493.

(*c*) Sugd. V. & P., 14th ed. p. 2, citing Rolle, Ab. 101, pl. 16.

(*d*) *Reg.* v. *Roebuck*, (1856) 7 Cox C. C. 126.

(*e*) See *per* Willes, J., *Anderson* v. *Pacific Insurance Co.*, (1872) L. R. 7

action for a false representation as to a mere matter of opinion lies in the difficulty of proving what the defendant's real opinion was.

Misstatement of legal position.

A misrepresentation as to a person's legal position may be a sufficient misstatement of fact to afford matter of defence; thus a fraudulent misstatement as to the legal effect of a deed will preclude the party guilty of the fraud from enforcing the deed (*a*). And a similar rule prevails where, in the absence of independent advice, a material fact has been kept back from the knowledge of the party executing the deed (*b*), but whether such concealment or misstatement will give a cause of action for deceit has apparently never been decided, though there seems to be no valid reason why it should not (*c*).

A misrepresentation may be either express, or implied from conduct.

Express representation.

Even where a representation is in express terms it may be open to question what is to be understood by them. The proper construction to put upon the words used is not necessarily the literal one. "If a person make a representation of that which is true, if he intends that the party to whom the representation is made should not believe it to be true, that is a false representation" (*d*). Conversely if a statement be in terms untrue, but not intended or not calculated to be interpreted in its literal, sense, it cannot be charged as a deceit. To this latter head may possibly be referred the case of exaggerated praise by a vendor (*e*), as where he says his goods are the best in London for the price, he knowing that the very same articles are procurable in the immediate neighbourhood at a lower price. He knows that his statement will be construed as mere puffing. Again, fragmentary statements may be in terms true so far as they go, but if they suggest that which is false, and are intended

C. P. p. 69; though in *Peek* v. *Gurney*, (1873) L. R. 6 H. L. p. 404, there is a passage in Lord Cairns's judgment which seems to suggest that in his view a statement of opinion is not a statement of fact.

(*a*) *Hirschfeld* v. *London, Brighton & South Coast R. Co.*, (1876) 2 Q. B. D. 1.

(*b*) *Barron* v. *Willis*, (1900) 2 Ch. 121; and see *O'Connor* v. *Foley*, (1905 1 Ir. R. 1.

(*c*) See *West London Commercial Bank* v. *Kitson*, (1884) 13 Q. B. D. 360.

(*d*) *Per* Alderson, B., *Moens* v. *Heyworth*, (1842) 10 M. & W. p. 158.

(*e*) Though it may also be explained on the ground given above, that the case of vendor is anomalous.

to do so, that will constitute an actionable fraud (*a*). "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual mistatement" (*b*).

Representation implied from conduct.

A misrepresentation may be implied from a party's conduct; if one conducts himself in a particular way with the object of fraudulently inducing another to believe in the existence of a certain state of things contrary to the fact and to act upon the basis of its existence, and damage results therefrom to the party misled, he who misled him will be just as much liable as if he had misrepresented the facts in express terms (*c*). If a person goes into a shop in a University town, not being a member of the University, and purchases goods on credit, the fact that he is at the time wearing a college cap and gown amounts to a representation that he is a member of the University, and, therefore, may be safely trusted, although he makes no statement in terms to that effect (*d*).

Wilful incitement to commit crime.

Again it amounts to fraudulent misrepresentation, sounding in damages, for a person wilfully and deliberately to induce an innocent person to commit a statutory offence, by representing the obnoxious act as being neither illegal nor immoral (*e*).

Repudiation of contract obtained by misrepresentation.

And where a transaction between two parties is tainted by an original misrepresentation by one of them neither *laches* nor condonation will be imputed to a plaintiff who has continued to make payments (under protest) after finding out the

(*a*) See *per* Lord Cairns, *Peek* v. *Gurney*, (1873) L. R. 6 H. L. p. 403.

(*b*) *Per* James, L.J., *Arkwright* v. *Newbold*, (1881) 17 Ch. D. p. 318; and see *per* Lord Selborne, *Coaks* v. *Boswell*, (1886) 11 App. Cas. p. 236.

(*c*) As to what amount and character of wilful misrepresentation will, and will not, entitle a plaintiff to an injunction restraining the defendant from continuing a series of misstatements whereby the plaintiff is aggrieved, see *Agello* v. *Worsley*, (1898) 1 Ch. 274; *Walter* v. *Ashton*, (1902) 2 Ch. 282.

(*d*) *Rex* v. *Barnard*, (1837) 7 C. & P. 784; and see *Reg.* v. *Jones*, (1898) 1 Q. B. 119, a case of obtaining a meal at a restaurant.

(*e*) *Burrows* v. *Rhodes and Jameson*, (1899) 1 Q. B. 816.

misrepresentation. Such payments being held not to amount to an affirmation of the contract by him (*a*).

Representation of safety implied in issue of chattels for use.

An instance of misrepresentation by conduct arises in the case of issuing for use a chattel which, to the knowledge of the party issuing it, cannot safely be used in the way in which he knows that it is likely to be used. Such issue for use amounts to a representation that it may be safely used, and presumably none the less is this so where the thing is delivered in pursuance of a contract of sale.

Sale of dangerous chattel.

It is conceived that a person who sells a gun to another for use impliedly represents thereby that so far as he knows the gun is a safe one (*b*). And this representation incorporates in the act of sale itself, alike by implication of law and by statute, a warranty of such fitness; which the vendor cannot limit by a merely general repudiation of warranty applying to all the various classes of goods in which he deals. He must, in order to make such repudiation apply to the sale of a specific article, which he knows to be of an unusually dangerous nature, at the time of sale, inform the purchaser of the exceptional risk attendant upon its use (*c*). So, too, one who sells animals which he knows to be suffering from an infectious disease, and which he also knows the purchaser is likely to put along with other uninfected animals of his own, is presumably liable to an action of deceit if by reason of the non-disclosure of the disease such other animals of the purchaser are injured (*d*). Thus, where the defendant knowingly

(*a*) *Molloy* v. *Mutual Reserve Life Assurance Co.*, (1905) 22 T. L. R. 59.

(*b*) It is on this ground alone that the question left by Parke, B., to the jury in *Langridge* v. *Lery*, (1837) 2 M. & W. 519, whether the defendant warranted the gun to be a safe and secure one, can be explained; since, so far as appears from the evidence in that case, the only *express* representation was that the gun was by Nock, which did not necessarily import any statement that the gun was sound. Its being unsound was quite consistent with the representation being true.

(*c*) *Clarke* v. *Army & Navy Co-operative Society*, (1903) 1 K. B. 155, C. A. For Sale of Goods Act at length, see Chitty on Contracts, Ch. XIII.

(*d*) In such cases no doubt fraud is not strictly essential to liability. It was seen above (p. 479) that where the injury resulting from the plaintiff's having been misled into acting as he did was a physical injury, it is enough to show negligence. If a person when issuing a thing for use omits from pure forgetfulness to disclose a dangerous character which he knows it to possess he is liable for any damage that ensues. But a vendor of an article which he knows to have some dangerous quality, which would render it unsalcable if disclosed, does not omit to disclose it from forgetfulness; in his case therefore the action is more appropriately framed in

sold a diseased cow at a market without disclosing the fact of the disease, and the purchaser put the cow in a field with other cattle which caught the disease and died, Blackburn, J., said, "I entertain no doubt that the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind" (*a*). In *Mullett* v. *Mason*, (*b*), Willes, J., in the course of argument expressed an opinion that where a man buys an animal without any express warranty of freedom from disease, his putting it along with other animals is not the natural consequence of the purchase—otherwise, where he buys with a warranty. But with submission there seems no valid reason for any such distinction.

In yet another case (*c*) where the defendant sent to market some pigs suffering from typhoid fever and sold them "with all faults," and the purchaser put them with other pigs of his own which caught the fever and died, the House of Lords held that the purchaser could not recover damage for the non-disclosure; but they went expressly upon the ground that the sale was "with all faults," suggesting thereby, though they declined to decide the point, that in the absence of such a condition, the non-disclosure would have amounted to such a misrepresentation as would have founded an action of deceit (*d*). They apparently regarded the terms of the conditions of sale as putting the purchaser upon enquiry, and as amounting to an express negation of the representation of freedom from infectious disease which, but for that condition, would have been implied from the mere sale (*e*). It seems clear that where the relation between the parties is not

Loan or gift of dangerous chattel.

deceit. It is only where such a thing is issued gratuitously that an action for negligence is the more appropriate form.

(*a*) *Bodger* v. *Nicholls*, (1873) 28 L. T. N. S. 441. It is true, he goes on to suggest, that the case might be different if the animal were sold privately, but he gives no reason for his proposition.

(*b*) (1886) L. R. 1 C. P. p. 562.

(*c*) *Ward* v. *Hobbs*, (1877) 4 App. Cas. 13.

(*d*) See *per* Lord Cairns, *ibid.* p. 24, and *per* Lord Selborne, p. 29.

(*e*) The case of *Hill* v. *Balls*, (1857) 2 H. & N. 299, where in similar circumstances the action was held not to lie, turned entirely on the faulty framing of the declaration, which contained no averment of fraud. See the judgment of Martin, B.

that of vendor and purchaser the party who puts an article into the hands of another to be used in a particular way is bound to warn him of any defect in the article which to his knowledge is likely to make the user dangerous. This is the rule in the case of a gratuitous loan. "By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous . . . to him" (*a*). A similar duty to warn of the existence of a hidden danger arises in the case of a gift (*b*). But if there is a duty to disclose defects which may be productive of injury, where the party acts gratuitously, it is difficult to see how his duty can be less where he acts for reward as in the case of a vendor. No doubt where a vendor sells a specific thing which the buyer has an opportunity of inspecting, he will not as a rule be liable on the contract to make good to the buyer his loss arising from the thing turning out to be worthless in consequence of the existence of some secret defect known to but not disclosed by him. So far as the buyer's loss of his purchase-money, or of any profit which he would have made if the defect had not existed, is concerned, the general rule is, *caveat emptor* (*c*). To entitle the purchaser to recover damages for such loss mere non-disclosure is not enough, there must be some active concealment, or, as it has been termed, aggresive deceit (*d*); as where the seller of a vessel, whose bottom and keel were rotten, purposely took her off the ways after she had been advertised for sale and floated her in order to conceal her defective condition (*e*). But when the secret defect or bad quality of the thing sold is not merely such as to render the thing itself of less value, and so to cause the buyer to lose his purchase-money and profit, but is in addition noxious and dangerous and likely to produce damage to the person or other property of the buyer, in the

Doctrine of *caveat emptor* applies only to loss of purchase-money and profit.

Not to consequential injury.

(*a*) *Per* Coleridge, J., *Blakemore* v. *Bristol, &c., R. Co.*, (1858) 8 E. & B. p. 1051. The duty is there spoken of as contractual, but it also arises *ex delicto*, for loans and gifts are in this respect on the same footing, and a gift cannot be regarded as a contract.

(*b*) *Per* Willes, J., *Indermaur* v. *Dames*, (1866) L. R. 1 C. P. p. 286.

(*c*) *Parkinson* v. *Lee*, (1802) 2 East, 314. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); and see *Reg.* v. *Roebuck*, (1856) 7 C. C. C. 126.

(*d*) *Per* Jervis, C.J., *Keates* v. *Cadogan*, (1851) 10 C. B. p. 600.

(*e*) *Schneider* v. *Heath*, (1813) 3 Camp. 506, with which cp. *Baglehole* v. *Walters*, (1811) 3 Camp. 154.

event of his using or dealing with the thing in the way in which the seller intends him to use or deal with it, or knows that he is likely to use or deal with it, the seller must, it is apprehended, be under an obligation to disclose such secret defect or bad quality if he knows of its existence; and must, in the event of his not disclosing it, be held liable for any damage to the person or other property of the buyer naturally resulting from the user, as upon an implied representation that such defect or bad quality did not exist; though at the same time the rule of *caveat emptor* will exclude his liability to refund the purchase-money (*a*). The view here put forward seems no doubt at first sight to point to an inconsistency, in that it suggests that where the noxious quality of the thing sold is also the cause of the depreciation in its value the seller is at one and the same time under an obligation and yet not under an obligation to disclose the defect. But the inconsistency is only apparent; it is quite consistent with there being no obligation arising out of the contract as between vendor and purchaser that there may be an obligation imposed by law as between man and man. And further, the fact that the noxious quality is also the cause of the lessening of value and that consequently the vendor cannot disclose the one without also disclosing the other is merely accidental; cases might readily be put in which the injurious quality was wholly distinct from the cause of depreciation, and in such cases the apparent inconsistency would altogether disappear—for instance, a gun might be sold which was worthless by reason of the insufficiency of the stock and locks, but dangerous only by reason of the fact, known to the vendor, that it was loaded at the time of the sale; though the vendor would not be bound to inform the buyer as to the worthlessness of the gun, he surely would be liable for any injury caused to the buyer by reason of the non-disclosure of the fact that the gun was loaded. And if so, no substantial distinction can be drawn between the case so put and one in which the dangerous character of the article also affected the value, as for instance where the dangerous character of a gun arose from permanent defects in the barrels.

No representation of the non-existence of defects, however, is

No implied representation where

(*a*) As to the extent of this liability see *Clarke* v. *Army and Navy Co-operative Society*, (1903) 1 K. B. 155, C. A.

means of knowledge of both parties equal.

to be implied from mere non-disclosure where, the means of knowledge of both parties being equal, it is under the circumstances reasonable to expect that the plaintiff will, before acting on the assumption of such defects not existing, exercise his means of knowledge and investigate the state of things for himself (*a*). Thus, where the defendant demised to the plaintiff a house which he knew to be in a ruinous and dangerous condition without disclosing the fact, and shortly after the plaintiff entered upon occupation the house fell down, whereby he was injured in health and his goods were damaged, it was held that he could not recover damages for such injury, for the fact of a house being ruinous is apparent to any one who takes the trouble to examine it, and it was the plaintiff's own fault that he did not make a proper investigation and satisfy himself as to the condition of the house before he entered upon the occupation of it (*b*).

Secret commission.

Again, the payment of a bribe or secret commission, by one principal to the servant or agent of the other principal to a contract, is *primâ facie* evidence of fraud and will entitle the party whose servant accepted the bribe to rescind the contract which he may have been induced subsequently to enter into with the briber (*c*) upon the ground that the transaction is tainted by the corrupt dealing. And the same rule applies where a sub-agent, accepts a commission from the other party to a transaction without the knowledge of either the chief agent or of the principal on behalf of whom such chief agent was acting (*d*).

State of defendant's mind.

The next matter to be considered, in connection with the conditions of liability to an action of deceit, is the state of the defendant's mind as regards his knowledge of the falsity, or belief in the truth, of the representation which he makes (*e*).

Knowledge of untruth of representation.

(1.) If the defendant knows his statement to be untrue he will be responsible (*f*). If he have knowledge of the untruth it will

(*a*) Equal means of knowledge is immaterial where there is an express representation, for the plaintiff is thereby put off his guard: *Dobell* v. *Stevens*, (1825) 3 B. & C. 623.

(*b*) *Keates* v. *Cadogan*, (1851) 10 C. B. 591. The loss of the benefits expected to be enjoyed from the lease itself was covered by the principle of *caveat emptor*; the case is only cited with reference to the damages *ultra*; and see *Cavalier* v. Pope, (1905) 74 L. J. K. B. 857 C. A.

(*c*) *Bartram & Sons* v. *Lloyd*, 90 L. T. 357, C. A.

(*d*) *Powell & Thomas* v. *Evan Jones & Co.*, (1905) 1 K .B. 11.

(*e*) *Gordon* v. *Street*, (1899) 2 Q. B. 641, C. A.

(*f*) *Pasley* v. *Freeman*, (1789) 3 T. R.

be perfectly immaterial that he may not have acted fraudulently in the worst sense of the term, that is to say, from a bad motive of gain to himself or of injury to the plaintiff. Thus, if a person knowing a servant to have been guilty of dishonesty recommends him as thoroughly trustworthy to another, who employs him in consequence of such recommendation, he will be responsible for the subsequent dishonest conduct of the servant, although his only object in making the untrue statement was to assist the servant in getting employment (*a*). So, where a bill having been presented for acceptance at the office of the drawee in his absence, the defendant wrote on the bill an acceptance as by procuration of the drawee, knowing that he had not the drawee's authority to do so, but honestly believing that the acceptance would be ratified and the bill paid, and the bill was subsequently dishonoured without ratification of the acceptance, the defendant was held liable to an indorsee for the untrue representation of authority to accept, notwithstanding that he had acted without any corrupt motive (*b*).

Absence of belief in its truth.

(2.) Although the party making the representation may have had no knowledge of its falsehood, yet he will be equally responsible if he had no belief in its truth, and made it "not caring whether it was true or false" (*c*). "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts" (*d*). "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation

51. This was the first case in which fraud was held to give a cause of action between persons not parties to a contract.

(*a*) *Foster* v. *Charles*, (1830) 6 Bing. 396.

(*b*) *Polhill* v. *Walter*, (1832) 3 B. & Ad. 114. See too *per* Lord Cairns, *Peek* v. *Gurney*, (1873) L. R. 6 H. L. p. 409.

(*c*) *Per* Smith, J., *Joliffe* v. *Baker*, (1883) 11 Q. B. D. p. 275.

(*d*) *Per* Maule, J., *Evans* v. *Edmonds*, (1853) 13 C. B. p. 786.

which he knew to be false, or did not believe to be true" (*a*). This is the condition of mind referred to by Lord Cairns in *Reese River Co.* v. *Smith*, where he says, "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue" (*b*). By the term "ignorant" he must be understood to have meant consciously ignorant, devoid of belief in the truth of their assertions (*c*). So, "where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false" (*d*). It is to statements made in this manner, where the condition of the mind is purely negative as to belief, that the epithet "reckless" is properly applied (*e*).

That belief unreasonable will not suffice.

(3.) Whether, however, in the case of a party making a misstatement which he honestly believes to be true, the mere fact of his belief in its truth is of itself a defence to an action of deceit, or whether he must not be held liable if it be shown that he was negligent in not acquiring knowledge of the untruth, in other words, that his belief was founded upon unreasonable grounds, is a question which until recently had not been definitely settled. Although the great weight of authority (*f*) was undoubtedly in favour of the contrary view, there was some authority (*g*), and much reason in principle, in favour of the view

(*a*) *Per* Lord Herschell, *Derry* v. *Peek*, (1887–9) 14 App. Cas. p. 368; and see *Pritty* v. *Child*, (1902) 71 L. J. K. B. 512.

(*b*) (1869) L. R. 4 H. L. p. 79; and see *Angus* v. *Clifford*, (1891) 2 Ch. 449.

(*c*) See *Haycraft* v. *Creasy*, (1801) 2 East, p. 107, where an assertion of knowledge was held to mean an assertion of belief.

(*d*) *Per* Lawrence, J., *Rex* v. *Mawby*, (1796) 6 T. R. p. 637. Here also the term "knowledge" is used in the sense of belief.

(*e*) The expression "recklessness" when used in this context must not be confused with mere absence of reasonable ground for believing the statement to be true. See *per* Lord Herschell, *Derry* v. *Peek*, (1887–9) 14 App. Cas. p. 361. See too *Angus* v. *Clifford*, (1891) 2 Ch. 449; and see *Pritty* v. *Child*, (1902) 71 L. J. K. B. 512.

(*f*) This authority consisted almost entirely of *dicta*; the only direct decisions on the point being *Taylor* v. *Ashton*, (1843) 11 M. & W. 401; and possibly the judgment of Bramwell, L.J., in *Dickson* v. *Reuter's Telegram Co.*, (1877) 3 C. P. D. p. 6.

(*g*) *Ex. gr.* the judgment of Maule, J. in *Shrewsbury* v. *Blount*, (1840–1) 2 M. & G. 475; that of Lord Chelmsford in *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 Sc. App. p. 162, and that of Jessel, M.R,, in *Smith* v. *Chadwick* (1882) 20 Ch. D. 27.

that liability for misrepresentation is not limited to cases of fraud, that is to say, cases in which there is actual knowledge of the untruth, or absence of belief in the truth of the statement, but that there is also a liability where, the defendant, though honestly believing in the truth of his statement, had no reasonable grounds for such belief, and made the statement without taking ordinary care to ascertain whether it was true or false. But in the year 1889 it was finally settled by the House of Lords in *Derry* v. *Peek* (*a*) that it is essential to an action of deceit that there should be actual fraud, a guilty intention to deceive, and that a merely negligent misrepresentation, however gross the negligence may be, will not suffice. The decision in this case does not, however, avoid the rule laid down in *Collen* v. *Wright* (*b*), and approved in *Oliver* v. *Bank of England* (*c*) "that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it understood that it was true, and he is liable personally for the damage that has occurred."

Defendant forgetting facts once known.

Moreover it is not enough that the defendant should at one time have had knowledge of facts contrary to the representation that he makes, if at the time of making the representation he has honestly forgotten those facts. It was indeed formerly thought otherwise. Thus in *Brownlie* v. *Campbell* (*d*) Lord Selborne said, "The mere forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse; because if he had spoken the simple truth he would have said, 'I do not recollect whether it is so or not.'" In *Slim* v. *Croucher* (*e*), A. having applied to the plaintiff for an advance on the security of a lease about to be granted to him by the defendant, the plaintiff inquired of the defendant if he intended to

(*a*) (1887-9) 14 App. Cas. 337.
(*b*) (1857) 8 E. & B. 647.
(*c*) (1902) 1 Ch. 610; affirmed *sub. nom. Starkey* v. *Bank of England*, (1903) A. C. 114; and see *Hambro* v. *Burnand*, (1904) W. N. 77, C. A.
(*d*) (1880) 5 App. Cas. p. 936.
(*e*) (1860) 1 De G. F. & J. 518; and see *Marnham* v. *Weaver*, (1899) 80 L. T. 412.

grant it, and the defendant intimated that he did, but there was no contract with the plaintiff that he should grant it. The lease was subsequently granted to A. and mortgaged by him to the plaintiff, but owing to the fact that the defendant had previously granted another lease of the same premises to A., which he had mortgaged to a third party, the plaintiff's security was valueless. The plaintiff sued the defendant for damages to the amount of his advance, and the fact that the defendant had honestly forgotten the circumstance of the first lease was held to be no defence. This doctrine seems to have been based upon the ground that "the plaintiff cannot dive into the secret recesses of the defendant's heart, so as to know whether he did or did not recollect the fact" (*a*). But it is now well established that in an action of deceit it is essential that the defendant should be conscious of the untruth of his statement at the time of making it (*b*). No doubt when it can be shown that the defendant had at one time known facts inconsistent with the truth of his statement, there will be strong evidence for the jury that he knew such facts at the time of making the statement and that the statement was consequently fraudulently made, and if such knowledge be shown to be of very recent date the inference of fraud becomes almost irresistible; but the existence of such knowledge at the time of the statement must be found as a fact, mere past knowledge cannot as matter of law be treated as equivalent to fraud.

Defendant becoming aware of untruth after statement made.

In the converse case, where the defendant does not acquire knowledge of the untruth of his statement until after it has been made, but becomes aware of it before the plaintiff has acted upon it, there seems to be no authority needed to show that he is bound to communicate the truth, and will be answerable in damages if he does not (*c*).

Statement becoming untrue *ex post facto*.

Where the statement complained of was in fact true at the time when made, but, before being acted upon by the party to

(*a*) *Per* Grant, M.R., *Burrowes* v. *Lock*, (1805) 10 Ves. p. 476. But see *per* Bowen, L.J., *Angus* v. *Clifford*, (1891) 2 Ch. p. 471.

(*b*) See *per* Lord Halsbury, *Derry* v. *Peek*, (1887-9) 14 App. Cas. p. 343. For exception to this rule, see *Oliver* v. *Bank of England*, (1902) 1 Ch. 610. In *Low* v. *Bouverie*, (1891) 3 Ch. 82, the case of *Slim* v. *Croucher* was expressly overruled; but see *Chadwick* v. *Manning*, (1896) A. C. 231, P. C.

(*c*) See *per* Lord Blackburn, *Brownlie* v. *Campbell*, (1880) 5 App. Cas. p. 950.

whom it was made, has been rendered untrue, by reason of a fact coming into existence to the knowledge of the party making it, it seems doubtful whether the non-communication can be made the ground of an action of deceit (*a*), although in cases in which a contract has been entered into between the parties upon the faith of such representation, the Court will not hold the party to whom the representation was made bound, unless the change of circumstances has been communicated to him (*b*).

As with the defendant's forgetfulness of facts once known, so with the unreasonableness of the grounds of his belief; though it will not of itself support an action, it will be evidence from which fraud may be inferred. There must be many cases "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one" (*c*).

Fraud not necessary for estoppel.

With reference, however, to this non-liability of a person for a false statement carelessly but honestly made, a distinction is to be taken between those cases in which it is sought to make such false statement the foundation of the action, and those in which the action being brought for another cause, it is incidentally sought to estop the defendant from denying the truth of his assertions. Negligence in making a misstatement will suffice to found an estoppel. "But an estoppel is not a cause of action," and the decision in *Derry* v. *Peek* does not "in any way affect the law relating to estoppel where such law is applicable" (*d*). Of this principle the case of *Burrowes* v. *Lock* (*e*) is an illustration. There one Cartwright assigned to the plaintiff for a price his interest in a fund of which the defendant was trustee. The plaintiff, before fixing the price, had consulted the defendant, who asserted that Cartwright's interest amounted to a certain sum, whereas in fact Cartwright had previously created an incumbrance upon it which reduced it below that sum. The

(*a*) See per Cotton and James, L.JJ., *Arkwright* v. *Newbold*, (1881) 17 Ch. D. pp. 325, 329.

(*b*) *Traill* v. *Baring*, (1864) 4 De G. J. & S. p. 329.

(*c*) *Per* Lord Herschell, *Derry* v. *Peek*, (1887–9) 14 App. Cas. p. 376.

(*d*) *Per* Lindley, L.J., *Low* v. *Bouverie*, (1891) 3 Ch. p. 101.

(*e*) (1805) 10 Ves. 470. See the pleadings and decree in this case reported, (1891) 3 Ch. p. 95 (note).

defendant had previously known of this incumbrance, but forgot the circumstance at the time of making the statement to the plaintiff. It was held that to a bill to recover the amount of Cartwright's unincumbered interest the defendant's forgetfulness was no answer, and that he was bound to make his statement good. This decision has, since the case of *Derry* v. *Peek*, been affirmed and explained to have proceeded upon the ground of estoppel (*a*).

It appears that it is upon the ground of estoppel alone that the case of *Burrowes* v. *Lock* can be supported. The ground upon which Lord Herschell in *Derry* v. *Peek*, (*b*), endeavoured to distinguish *Burrowes* v. *Lock* from the the case before him, namely, that it was a case " where a person, within whose special province it lay to know a particular fact, has given an erroneous answer to an enquiry made with regard to it by a person desirous of ascertaining the fact, for the purpose of determining his conduct accordingly, and has been held bound to make good the assurance he has given," seems to be hardly sufficient, for that is language which is not altogether inapplicable to the case with which he was then dealing, that of a director issuing a prospectus. Nor can the explanation given of that case by Lord Blackburn in *Brownlie* v. *Campbell* (*c*), that there was something in the nature of a warranty, be accepted, for there was no evidence of any intention to warrant in that case. While the ground upon which it was explained by Lord Selborne in the same case of *Brownlie* v. *Campbell*, that the defendant having once had knowledge of the fact denied, could not plead forgetfulness as an excuse for a positive assertion to the contrary, must be regarded as wholly inconsistent with *Derry* v. *Peek*, and, notwithstanding Lord Herschell's disclaimer of any intention to dissent from Lord Selborne's explanation, must be treated as overruled by it (*d*).

Where a statement is capable of being understood in more senses than one it is essential to liability that the party making the statement should have intended it to be understood in a sense in which it is untrue. Even though the more natural and reasonable interpretation of the statement made by the defendant

(*a*) *Low* v. *Bourerie*, (1891) 3 Ch. 82.
(*b*) (1887-9) 14 App. Cas. 360.
(*c*) (1880) 5 App. Cas. 953.
(*d*) See *per* Lindley, L.J., (1891)] 3 Ch. pp. 101-2.

is that put upon it by the plaintiff, and though in the sense in which it is so understood by the plaintiff it is untrue to the knowledge of the defendant, that will not suffice if the defendant did not intend it to be so interpreted, and *à fortiori* this rule applies when the plaintiff did not believe it himself (*a*). In *Derry* v. *Peek* (*b*), an Act incorporating a tramway company provided that the carriages might, with the consent of the Board of Trade, be moved by steam power. The directors, before obtaining such consent, issued a prospectus stating that by their Act they had authority to use steam power, intending thereby to convey that whereas the General Tramways Act, 1870, had divided tramways into two classes, those which might only use animal power and those which might use the power prescribed by the special Act, the Tramway in question belonged to the latter class. The Board of Trade refused their consent, whereupon the company was wound up. In an action of deceit brought against the directors by a person who, understanding the prospectus to mean what it said, had bought shares in the company on the faith of it, it was held by the House of Lords, reversing the decision of the Court of Appeal, that the directors, having no intention to deceive, were not liable. Lord Herschell, in delivering his judgment in that case, stated that it was with reluctance that he arrived at the conclusion at which he did, for he thought that "those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact" (*c*), but he thought that the duty to take care in such matters was only a moral duty. In the following year the law, so far as misrepresentations in prospectuses are concerned, was expressly altered by the Legislature in the Directors' Liability Act, 1890 (*d*). That statute provides that every director or promoter (*e*), or other person authorising the issue of

Derry v. *Peek.*

(*a*) *Bell* v. *Marsh*, (1903) 1 Ch. 528, C. A.

(*b*) (1887-9) 14 App. Cas. 337.

(*c*) S. C. p. 376.

(*d*) 53 & 54 Vict. c. 64, s. 3, sub-s. (1).

(*e*) It is provided by s. 5 of this Act that where two co-promoters of a company join in the issue of a prospectus containing a wilfully untrue statement, and damages are recovered against one of them, the promoter from whom such damages have been recovered is entitled to contribution from his co-promoter: *Gerson* v. *Simpson*, (1903) 2 K. B. 197, C. A.

a prospectus of a company, shall be liable for any untrue statement contained in it unless it be proved; (a) in the case of statements not purporting to be made on the authority of an expert, or of an official person, or of a public official document, that he had reasonable ground to believe and did, up to the time of the allotment of the shares, debentures, or debenture stock, believe that the statement was true; (b) in the case of statements made on he authority of an expert, that he fairly represented the statement of such expert, provided that even in such event he should none the less be liable if it be proved that he had no reasonable ground for believing that the expert was competent to make the statement; and (c) in the case of a statement purporting to be made on the authority of an official person, or of a public official document, that it was a fair representation of the statement of such person, or copy or extract of such document. The *onus* of proof as to the reasonableness of the grounds of the defendant's belief in the truth of his statement under (a) would seem to be upon the defendant, that of the unreasonableness of his grounds for believing in the competence of the expert under (b) would seem to be upon the plaintiff (*a*).

By 63 & 64 Vict. c. 48, s. 10, every prospectus issued by or on behalf of a company or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state: (a) The contents of the memorandum of association: (b) the number of shares and the remuneration of directors; (c) the names, descriptions, and addresses of the directors; (d) the minimum subscription on which the directors may proceed to allotment; (e) the capital of the company, distinguishing shares and debentures; (f) the names and addresses of the vendors of any property purchased or acquired by the company; (g) the amount of the purchase-money, specifying the sum paid for goodwill, and distinguishing cash, shares, and debentures; (h) the amount of commission payable for subscribing or procuring subscriptions: (i) the amount of preliminary expenses; (j) the amount of promotion money; (k) the dates

(*a*) An action under this statute, for compensation for loss or damage occasioned by an untrue statement in a prospectus, need not be brought within two years as provided by the Civil Procedure Act, 1833; *Thomson* v. *Clanmorris*, (1899) 2 Ch. 523.

and particulars of every material contract; (l) the names and addresses of the auditors of the company; and (m) the nature and extent of the interest of every director in the promotion of, or in the property to be acquired by the company (*a*).

Representation must be intended to be acted on by plaintiff.

In order to give a cause of action of deceit not only must the statement complained of be untrue to the defendant's knowledge, it must be made with intent to deceive the plaintiff, with intent, that is to say, that it shall be acted upon by him. And it is in some cases a matter of difficulty to determine whether the plaintiff was one of the persons to whom the representation was addressed, and who were intended to act upon it.

Representation need not be made to plaintiff directly.

"It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby" (*b*). Thus, where the defendant advertised a certain farm to be let with immediate possession, knowing that he had no power to let the farm and that it was not to be let, and the plaintiff believing in the *bona fides* of the advertisement and being desirous of becoming tenant of the farm incurred expense in inspecting it, it was held that the representation was sufficiently made to the plaintiff (*c*).

Reports of directors.

Reports of joint stock companies, even though nominally addressed only to the shareholders, if in fact intended to be acted on by any persons who are likely to have dealings with the company, are sufficiently addressed to the persons so dealing, to

(*a*) As to when a director's secret interest in a contract made by a third party with the company automatically vacates his office, see *The Bodega Co. Ltd., In re*, (1904) 1 Ch. 276. And as to illicit contracts by directors generally, see *Laughland* v. *Millar Laughland & Co.*, (1904) 6 F. 413, Ct. of Sess., and cases noted therein.

(*b*) *Per* Quain, J., *Swift* v. *Winterbotham*, (1873) L. R. 8 Q. B. p. 253; cited with approval by Blackburn, J., *Richardson* v. *Silvester*, (1873) L. R. 9 Q. B. p. 36. *Swift* v. *Winterbotham* afterwards went to the Exchequer Chamber (see (1873) L. R. 9 Q. B. 301), but the present point was not there discussed.

(*c*) *Richardson* v. *Silvester*, (1873) L. R. 9 Q. B. 34.

entitle them to sue the persons issuing the reports if they are false (*a*). Thus, where directors of a bank made a false report to the shareholders as to the financial position of the bank, and copies of the report were to be bought by any persons who applied for them, whether shareholders or not, it was held that the directors were liable in damages to a member of the public who, having procured a copy of the report, upon the faith of it bought shares in the bank which shortly afterwards stopped payment (*b*). So, where the managers of a company with the view of getting a quotation for their shares and thereby defrauding members of the public who should buy such shares fraudulently represented to the committee of the Stock Exchange that two-thirds of their scrip had been paid upon, that being according to the well-known rules of the Stock Exchange a condition precedent to the obtaining of a quotation, it was held that there was sufficient representation to a member of the public, who bought shares upon the faith of the Stock Exchange requirements having been fulfilled, and payments on two-thirds of the scrip having been made (*c*).

In *Reg.* v. *Aspinall* (*d*), where the defendants were indicted for conspiring to falsely represent to the committee of the Stock Exchange that the rules had been complied with, with a view of obtaining a quotation for their shares, and thereby inducing the public to buy such shares, the objection, that the injury to the public was too remote, was taken, and overruled by the Court of Appeal; and after verdict for the Crown, an omission in the indictment to aver an intent to defraud prospective purchasers of shares was held immaterial, since "the natural and probable

(*a*) As to what constitutes an offer of shares to the public, see *Burrows* v. *Matabele Gold Reefs & Estates Co., Ltd.*, (1901) 2 Ch. 23; and *Dexter* v. *United Gold Coast Mining Properties, Ltd.*, (1901) W. N. 152.

(*b*) *Scott* v. *Dixon*, (1859) 29 L. J. Ex. 62 (n.).

(*c*) *Bedford* v. *Bagshaw*, (1859) 4 H. & N. 538. This case was indeed disapproved by Lord Chelmsford in *Peek* v. *Gurney*, (1873) L. R. 6 H. L. p. 397, upon the ground that, it being the plaintiff's knowledge of the rules that led him to appropriate the representation to himself, it could not be taken to be made to anyone who was ignorant of the rules, and therefore could not be taken to be made to the plaintiff. But, with submission, it was intended to be made to all members of the public, though as regards those who did not know the rules it would necessarily be ineffectual.

(*d*) (1876) 2 Q. B. D. 48.

effect of deceiving the committee in the mode alleged would be to injure and deceive purchasers" (*a*), and an intent to deceive such purchasers ought consequently to be inferred (*b*).

"Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts and so acting is damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss" (*c*). But it is essential that there should be an actual intention to deceive the plaintiff or the class to which he belongs; it will not be enough that the misstatement is reasonably calculated to deceive him.

There are indeed *dicta* to be found which suggest the contrary. Thus in *Bedford* v. *Bagshaw* (*d*), Pollock, C.B., said: "There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or at all events that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing." That passage was cited in its entirety with approval by Quain, J., in delivering the judgment of the Court in *Swift* v. *Winterbotham* (*e*), and in *Barry* v. *Croskey* (*f*) Page-Wood, V.-C., stated that he agreed with every word in the Chief Baron's judgment in *Bedford* v. *Bagshaw*. But neither in *Bedford* v. *Bagshaw* itself, nor in either of the two above cases in which the terms of Pollock, C.B.'s judgment were approved, was it necessary to hold that anything less than

(*a*) S. C. at p. 65.

(*b*) Lord Chelmsford's disapproval of *Bedford* v. *Bagshaw* was not indeed there referred to, but inasmuch as the majority of the Lords in *Peek* v. *Gurney* expressed no disapproval of *Bedford* v. *Bagshaw*, the principle of that decision must be considered to be re-established by the above case of *Reg.* v. *Aspinall*. At all events the headnote to the Law Report of *Peek* v. *Gurney* must, in so far as it states that *Bedford* v. *Bagshaw* is there overruled, be regarded as incorrect. The case of *Salaman* v. *Warner*, (1891) 65 L. T. N. S. 132, does not in any way impugn the correctness of the decision in *Bedford* v. *Bagshaw*, for there the contracts entered into by the plaintiff for the sale of shares were made *before* the quotation was granted by the Stock Exchange, and consequently not upon the faith of the Stock Exchange requirements having been complied with.

(*c*) *Per* Page-Wood, V.-C., *Barry* v. *Croskey*, (1861) 2 J. & H. p. 23.

(*d*) (1859) 29 L. J. Ex. p. 65.

(*e*) (1873) L. R. 8 Q. B. p. 253.

(*f*) (1861) 2 J. & H. p. 22.

an actual intention to deceive the plaintiff would suffice, there being in each of these cases abundant evidence of such intention. When it is once established that the gist of an action of deceit is intention, it seems clearly to follow that a plaintiff in such an action must prove himself to have been within the contemplation of the defendant either as an individual or as a member of a class. The question indeed seems to be concluded by the decision of the House of Lords in *Peek* v. *Gurney* (*a*), where it was held that promoters of a company, who issue a fraudulent prospectus as a prospectus and as nothing more, are not liable for so doing to persons who, not being original allottees of the company's shares, purchase their shares on the market; the reason being that the promoters, having in such case no object in making the false statements except to get the shares taken up, intend to deceive only those who apply for allotments, so that when once the subscription list is full the office of the prospectus is exhausted. But the presumption that a prospectus is not intended to deceive persons other than applicants for allotments is a *primâ facie* presumption only; and if the promoters in issuing the prospectus have in fact the additional object of inflating the market price, and of increasing the value of the shares which they have allotted to themselves or their nominees, they will be liable as well to those who purchase from them on the market, as to original allottees (*b*).

The test of intention is interest.

Where a person has acted upon a false representation which was not made directly to him, the practical test whether he was intended to act upon it is whether it was to the defendant's interest that he should do so. Therefore, where persons spread a false rumour for the purpose of raising the price of certain stock, they will not be liable in damages to those who deal with other persons on the faith of such rumour being true (*c*), there being no intention to deceive any persons other than those who

(*a*) (1873) L. R. 6 H. L. 377.

(*b*) *Andrews* v. *Mockford*, (1896) 1 Q. B. 372. The case of *Gerhard* v. *Bates*, (1853) 2 E. & B. 476, where a purchaser of shares on the market was held entitled to sue for misstatements in a prospectus, arose on demurrer to a declaration which averred an intent to deceive the plaintiff, the existence of which intent was necessarily admitted as a fact for the purposes of the demurrer.

(*c*) *Per* Page-Wood, V.-C., *Barry* v. *Croskey*, (1861) 2 J. & H. p. 18; *per* Lord Cairns, *Peek* v. *Gurney*, (1873) L. R. 6 H. L. p. 412.

deal with the defendants themselves, inasmuch as the defendants have nothing to gain by their so doing.

Langridge v. *Levy.*

A case which may at first sight present some little difficulty in connection with this subject is the well-known case of *Langridge* v. *Levy* (*a*), where the defendant having sold a gun as sound and secure which he knew to be unsafe, was held liable in an action of deceit to the purchaser's son, who was wounded by the bursting of the gun, in spite of the fact that there was no evidence upon which the jury could have found any intention upon the part of the defendant that the representation of safety should be communicated to the son as distinguished from other persons, or any desire that the son should act upon the faith of such representation being true. The defendant's "immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son" (*b*). But the explanation of that case is that, the jury having found a general verdict for the plaintiff, the only question for the Court, on a motion to enter a nonsuit *non obst. vered.*, was as to the sufficiency of the declaration; and the Court upheld the verdict expressly upon the ground that the declaration contained an averment that the gun was sold *for the use* of the purchaser *and his sons*. The case can hardly be regarded as having decided any principle of general application.

This case might, however, well be supported at the present day upon the ground that, the injury to the plaintiff being a physical one, the action would lie without proof of fraud, and consequently it would be unnecessary to show that the plaintiff was intended to act upon the misrepresentation (*c*).

The plaintiff must have been influenced to some extent by the misrepresentation.

To entitle a plaintiff to sue for a misrepresentation made to him, it is not enough to show that it was followed by damage to him; he must show that the one was the cause of the other; he must establish that in doing the act whereby he suffered damage he was "*adhibens fidem*" (*d*), relying upon the representation being true. But, provided the misrepresentation complained of

(*a*) (1837) 2 M. & W. 519.

(*b*) *Per* Brett, M.R., *Heaven* v. *Pender*, (1883) 11 Q. B. D. p. 511.

(*c*) See above, p. 479.

(*d*) See judgment of Lord Brougham in *Attwood* v. *Small*, (1835) 6 Cl. & F. pp. 444–9.

substantially contributed to deceive the plaintiff, that will be enough; it need not be the sole cause of his deception. Thus, where misrepresentations as to the credit of a third person were made by the defendant to the plaintiff partly in writing and partly not, it was held sufficient to render the defendant liable that the statements in writing were a substantial part of the cause of the deception (*a*). If the plaintiff's mind was partly influenced by the defendant's misstatements the defendant will not be any the less liable because the plaintiff was also partly influenced by a mistake of his own (*b*). If the statement complained of is capable of being understood in more than one sense the plaintiff must of course show that he acted upon it in the sense in which it is false (*c*).

Need not have been solely influenced by it.

Carelessness of plaintiff in not discovering the untruth no defence.

It is no answer to an action for misrepresentation that the plaintiff might have discovered the falsity by the exercise of ordinary care (*d*). Thus, where a vendor of a public-house was sued in deceit for misrepresentations as to the takings of the business made pending the treaty, the fact that the defendant's books were in the house at the time of the treaty and would have disclosed the real amount of the takings, but the plaintiff neglected to examine them, was held to be no defence (*e*).

Misrepresentation as to credit of third persons.

Liability for misrepresentation as to the credit of third persons is to some extent cut down by the operation of 9 Geo. IV., c. 14, by s. 6 of which it is provided that "no action shall be maintained, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person

(*a*) *Tatton* v. *Wade*, (1856) 18 C. B. 371.

(*b*) See *per* Bowen, L.J., *Edgington* v. *Fitzmaurice*, (1885) 29 Ch. D. p. 483. See too *Peek* v. *Derry*, (1887) 37 Ch. D. 541.

(*c*) See *per* Lindley, L.J., *Smith* v. *Chadwick*, (1882) 20 Ch. D. p. 80.

(*d*) See *per* Lord Chelmsford, *Venezuela R. Co.* v. *Kisch*, (1867) L. R. 2 H. L. p. 120.

(*e*) *Dobell* v. *Stevens*, (1825) 3 B. & C. 623; and see *Pilmore* v. *Hood*, (1838) 5 Bing. N. C. 97, and *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1. The old case of *Baily* v. *Merrell*, (1615) 3 Bulst. 95, where the defendant, having fraudulently induced a carrier to carry for him a load of wood upon the representation that it weighed only 800lb. whereas in fact it weighed 2000lb., whereby the carrier's horses broke down, was held not liable on the ground the carrier ought to have weighed the load before attempting to draw it, cannot now be regarded as law.

may obtain money or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

To satisfy this statute the signature must be the *personal* signature of the party to be charged; that of an agent is insufficient. Therefore, where a father and son were carrying on business in partnership, and the son wrote a letter to the plaintiff containing a fraudulent statement as to the credit of a third person, signing it in the firm name, and subsequently showed it to his father who ratified it, it was held that, notwithstanding the ratification by the father, the signature was not such a signature by the father as to render him liable (*a*).

In another case the signature of the manager of an unincorporated banking company was held not to be a sufficient signature by the company itself, notwithstanding that there was no mode in which the company could sign other than by an agent (*b*). It must follow from that decision that the signature of the manager of an incorporated company will equally be insufficient to satisfy the statute. No doubt in *Barwick* v. *English Joint Stock Bank* (*c*), the defendants were held liable for a fraudulent misrepresentation as to the credit of a third person signed by their manager, but the point here suggested was not taken. It is submitted that upon this ground that case was wrongly decided. In the later case of *Bishop* v. *Balkis Consolidated Co.* (*d*), Vaughan Williams, J., held that a representation signed by the secretary of the defendant company could not bind the company, but *Barwick's Case* was not there referred to (*e*). He at the same time expressed an opinion that if the representation had been under the corporate seal, it would have been signed by the company within the meaning of the Act.

What will amount to a representation as to credit is in some

(*a*) *Williams* v. *Mason*, (1873) 28 L. T. N. S. 232; see too *Hyde* v. *Johnson*, (1836) 2 Bing. N. C. 776.

(*b*) *Swift* v. *Jewsbury*, (1874) L. R. 9 Q. B. 301.

(*c*) (1867) L. R. 2 Ex. 259.

(*d*) (1890) 25 Q. B. D. 77. On appeal the Court of Appeal thought that the particular representation in question in that case was not a representation as to credit, but they expressed no opinion as to whether if it had been the signature of the secretary would have been insufficient.

(*e*) And see *Whitechurch, Ltd.* v. *Cavanagh*, (1902) A. C. 117.

cases not easy to decide. In *Lyde* v. *Barnard* (*a*), the Court were equally divided upon the question whether a representation that a life interest in certain trust funds was charged with only a certain specified sum, was a representation concerning the credit or ability of the owner of the life interest. In *Bishop* v. *Balkis Consolidated Co.* (*b*) it was held by the Court of Appeal that what is known as a "certification of transfer" of shares in a joint stock company, that is to say a statement made by the company to the effect that the certificate relating to the shares intended to be transferred has been lodged with them by the intending transferor, is not a representation as to credit within the Act.

(*a*) (1836) 1 M. & W. 101.

(*b*) (1890) 25 Q. B. D. 512.

CHAPTER XVII.

DEFAMATION.

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Right of reputation.

THE right of each man, during his lifetime (*a*), to the unimpaired possession of his reputation and good name is recognised by the law. Reputation depends on opinion, and opinion in the main on the communication of thought and information from one man to another. He therefore who directly communicates to the mind of another matter untrue and likely in the natural course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong, for which the remedy is an action of defamation—a remedy, however, by no means commensurate with the damage that in every case may arise, but limited by many considerations of convenience and public policy. Defamatory matter may have no existence except as it is communicated or published in some fugitive manner. Such defamation is called slander. Or it may be embodied in some permanent form, and in such case, its production will be one thing, its publication another. Defamation of this kind is called libel.

Action of defamation.

Slander.

Libel.

Falsehood and malice.

Primâ facie the publication of defamatory matter is a cause of action. It is true that it is necessary for the plaintiff in his pleading to allege that the imputation published is false, and usual, though not necessary (*b*), to allege that it is malicious;

(*a*) Action is not maintainable for a slander on a deceased person (*Broom* v. *Ritchie*, (1904) 6 F. 842, Ct. of Sess.).

(*b*) *Per Cur.*, *Bromage* v. *Prosser* (1825) 4 B. & C. p. 255. And see *Reg.* v. *Munslow*, (1895) 1 Q. B, 758.

but the burden of proof of neither of these allegations lies upon him. It is not to be assumed that any one is of bad character, and therefore defamation of an individual may be taken to be false until it is proved to be true. As for the word malicious its meaning simply is that the publication was intentional and without just cause or excuse (*a*). Defamation must be wilful in the same way as all torts of commission must be. The existence of just cause or excuse is for the defendant to establish either out of the mouth of the adverse witnesses or by independent proof. What constitutes such just cause or excuse remains to be considered later on. At present it is necessary to consider more fully what libel is, what slander is, and what amounts to a publication.

Defamation must be wilful.

What is a libel.

The term libel of course properly indicates something printed or written, but it includes also any scandalous painting, effigy, or emblem. A gallows at the doorway of some obnoxious person may be a libel upon him (*b*).

A man may be libelled in respect either of his personal character, or of his office or vocation. In the former case the libel must consist of matter calculated to hold him up to "hatred, contempt, or ridicule" (*c*). Whether it does so or not depends, not upon the intention of the offending party, but upon the probabilities of the case, upon the natural tendency of the publication, having regard to surrounding circumstances (*d*). If a defendant has published "what he knew, or ought to have known, was calculated to injure the plaintiff, he must . . . be responsible for the consequences though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. . . . No one can cast about firebrands and death and then escape from being responsible by saying that he was in sport" (*e*). On the other hand, the mere

Does not depend on intention.

Language not in itself defamatory.

(*a*) *Per Cur.*, *Bromage* v. *Prosser*, (1825) 4 B. & C. p. 255.

(*b*) 5 Rep. 126; *Carr* v. *Hood*, (1808) 1 Camp. 355, n. See *Eyre* v. *Garlick*, (1878) 42 J. P. 68. In *Jefferies* v. *Duncombe*, (1809) 11 East, 227, the plaintiff recovered damages against the defendant for keeping in front of the plaintiff's house a lamp burning during the daytime, "thereby intending to mark out the dwelling-house of the plaintiff as a bawdy house." The action is described in the report as one of nuisance. It would seem, however, in substance an action of libel. And see *Monson* v. *Tussauds*, *Ltd.*, (1894) 1 Q. B. 671.

(*c*) *Per* Parke, B., *Parmiter* v. *Coupland*, (1840) 6 M. & W. p. 108.

(*d*) *Haire* v. *Wilson*, (1829) 9 B. & C. 643.

(*e*) *Per* Lord Blackburn, *Capital &*

intention to vex and annoy will not make language defamatory which is not so in its own nature (*a*). An imputation of conduct not in itself really censurable, however distasteful or objectionable the conduct may be according to the notions of certain people, is not a legal injury. "Would it be libellous," it has been asked, "to write of a lady of fashion, that she had been seen on the top of an omnibus, or of a nobleman that he was in the habit of burning tallow candles?" (*b*). "There is a distinction between imputing what is merely a breach of professional etiquette and what is illegal, mischievous, or sinful; between, in fact, matters of taste and matters of crime" (*c*). Thus it has been decided that in humble life the mere imputation of "want of womanly delicacy" is not actionable *per see* (*d*). Nor is it a libel to write of a medical man that he met homœopathists in consultation. A homœopathist may be a perfectly competent and qualified practitioner, and the imputation therefore was not of professional misconduct but simply of a breach of an arbitrary rule. In *Mawe* v. *Pigott* (*e*), the plaintiff had been attacked in the defendant's newspaper for certain denunciations of the Fenian conspirators which he was said to have made, and it was argued that he was exposed to hatred and contempt in the opinion of many people, by being represented as an informer or prosecutor or otherwise aiding in the detection of crime. "That is quite true," says the judgment, "but we cannot be called upon to adopt that standard. The very circumstance which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally" (*f*). To seriously depart from the accepted rules of right-feeling, good conduct, and prudence is either hateful or

Counties Bank v. *Henty*, (1880–2) 7 App. Cas. p. 772. In a case of criminal libel it is advisable, though not apparently essential, to insert an averment in the indictment that the publication was "to the manifest corruption of the morals of his Majesty's subjects," *Rex* v. *Barraclough*, (1905) 22 T. L. R. 41, C. C. R.

(*a*) The case of *Nevill* v. *Fine Arts, &c., Insurance Co.*, (1895) 2 Q. B. 156, as to which see below, p. 565, is perhaps difficult to reconcile with the earlier authorities.

(*b*) *Per* Pollock, C.B., *Clay* v. *Roberts*, (1863) 8 L. T. N. S. p. 398.

(*c*) *Per* Pollock, C.B., *ibid.*

(*d*) *A. B.* v. *Blackwood*, (1902) 5 F. 25, Ct. of Sess.

(*e*) (1869) Ir. Rep. 4 C. L. 54.

(*f*) *Ibid.* p. 62. See too *Miller* v. *David*, (1874) L. R. 9 C. P. 118.

contemptible. It is therefore libellous to impute ingratitude, hardheartedness, or insolence (*a*). But ridicule may be incurred through accidental circumstances, without any suggestion of moral blame. To apply a ludicrous nickname or to narrate an anecdote of which the hero cuts an absurd figure may constitute a libel (*b*). A mere statement that a person was suspected of crime, without any imputation of actual guilt, may be libellous (*c*), and an allegation that a person has brought a blackmailing suit, is actionable without proof of special damage (*d*). But it does not exceed the bounds of "fair comment," and is consequently not actionable *per se* for a dramatic critic to say that a play is vulgar and contains "a good deal of sorry stuff" (*e*).

Imputation.

There is apparently nothing defamatory in an imputation of insanity, and therefore it may be doubted whether such an imputation would be actionable, where not made with reference to a person in a particular office or calling, for insanity is rather a subject of pity than of any harsher feeling (*f*). No substantial distinction can be drawn between an imputation of mental disease and one of bodily disease. In *Rex* v. *Harvey* (*g*), where the defendant was convicted of libel for imputing to the King that he was insane, Abbott, C.J., directed the jury that "to assert falsely of his Majesty or of any other person that he labours under the affliction of mental derangement is a criminal act." But the conviction in that case is probably to be justified upon the ground that insanity would unfit the King for his office, or upon grounds which would be inapplicable in the case of a similar imputation upon a subject. Again, there is nothing defamatory *per se* in an imputation of insolvency, for a man may lose his money by pure misfortune. And, therefore, presumably no action will lie

Imputation of insolvency.

(*a*) *Cox* v. *Lee*, (1869) L. R. 4 Ex. 284; *Churchill* v. *Hunt*, (1819) 2 B. & Ald. 685; *Clement* v. *Chivis*, (1829) 9 B. & C. 172.

(*b*) *Cook* v. *Ward*, (1830) 6 Bing. 409.

(*c*) *Monson* v. *Tussauds, Limited*, (1894) 1 Q. B. 671.

(*d*) *Marks* v. *Samuel*, (1904) 2 K. B. 287, C. A.

(*e*) *McQuire* v. *Western Morning News*, (1903) 2 K. B. 100, C. A.

(*f*) *Morgan* v. *Lingen*, (1863) 8 L. T. N. S. 800.

(*g*) (1823) 2 B. & C. 257. In *Weldon* v. *Winslow* (Times, 1884, March 14, *et sqq.*), the plaintiff sued a medical man for falsely alleging that she was insane. But, the judge having withdrawn the case from the jury on the ground that the statement was privileged, it became unnecessary to discuss the question whether the imputation was defamatory.

for writing of a non-trader that he is insolvent, without more (*a*). A statement that a solicitor had been "cleaned out and lost his all" has, however, been held actionable (*b*) Ordinarily to support such an action the plaintiff must, however, it is apprehended, lay an innuendo that the insolvency was imputed to have been caused by circumstances discreditable to him.

Libel on a man in his calling

If a libel is pointed against a man with special reference to his calling or office, the limits of defamation appear to be wider (*c*). The words need not be provocative of hatred, ridicule, or contempt; it is sufficient if their tendency is injurious (*d*). An imputation of insanity is necessarily injurious to any person in his calling, and therefore defamatory if used with reference to such calling (*e*). Similarly, an imputation of insolvency is actionable if made against a trader (*f*).

Where calling no longer followed.

No one can be libelled in respect of an office which he has ceased to fill or a vocation which he has ceased to follow, but imputations against a man in some particular relation may also affect him in his general character. If it be alleged of a retired solicitor that he was guilty of sharp practice in his profession, he is not libelled as a solicitor, for he is no longer one, but he is libelled as a man, for he is accused of dishonesty (*g*). But if the imputation be that he was unskilful in his profession, then it may be questioned whether from any point of view the language is actionable.

Joint injury.

Where several persons are joined in some capacity they may be jointly defamed in that capacity and have a joint action for the joint injury. Thus, trading partners may recover for a libel on their solvency in respect of the damage done to their firm (*h*), and each individual has a separate right of action for such separate damage as he may have sustained (*i*). So a trading corporation

(*a*) Nearly all the cases to be found in the books in which a mere imputation of insolvency has been held actionable are cases in which the plaintiff was a trader.

(*b*) *A. B.* v. *C. D.*, (1904) 7 F. 22 Ct. of Sess.

(*c*) Defamation of this kind is more fully considered below, pp. 557 *sqq.*

(*d*) *Per* Lord Blackburn, *Capital & Counties Bank* v. *Henty*, (1880–2) 7 App. Cas. p. 771.

(*e*) *Morgan* v. *Lingen*, (1863) 8 L. T. N. S. 800.

(*f*) *Read* v. *Hudson*, (1700) 1 Lord Raym. 610.

(*g*) *Per* Parke, J., *Boydell* v. *Jones*, (1838) 4 M. & W. p. 450.

(*h*) *Forster* v. *Lawson*, (1826) 3 Bing. 452.

(*i*) *Robinson* v. *Marchant*, (1845) 7 Q. B, 918,

may sue in its corporate capacity for a libel disparaging its goods (*a*), or imputing insolvency (*b*) or any other matter calculated to injure it in the way of its business (*c*). But it is apprehended that a municipal or other non-trading corporation cannot sue for a libel in its corporate capacity, whatever the nature of the imputation may be. In the case of such a corporation any charge of misconduct must be treated as directed against the corporators as individuals (*d*). And where several persons, though exercising an office jointly, have no joint interest to be damaged, a libel on them in their collective capacity is not a joint injury but a several injury to each of them. In *Booth* v. *Briscoe* (*e*) the defendant had libelled "the trustees" of a certain charity. The several trustees joined in one action against him, and though it was assumed (*f*) that such joinder was permissible, it was held that each plaintiff had a separate cause of action and the damages of each ought to have been separately assessed.

Libel on thing may be libel on person.

To attack the reputation of a thing may be to attack the reputation of a person. An unfavourable review of a book may be a libel on the author, although he be not directly referred to, though in such case in order to become actionable it must be shown that the unfavourable review exceeded the bounds of fair comment. To allege of a tradesman that he habitually sells worthless goods is an impeachment of the vendor as well as of what he sells, and is necessarily defamatory because injurious to him in his trade. But it is not defamatory to assert that a particular article which he has in stock is worthless (*g*). A statement that a certain ship is unseaworthy is directed against the character of the ship not against the character of the owner, but if it be added that this unseaworthy vessel is advertised for carrying passengers, the statement becomes defamatory, for it involves almost necessarily a charge of misconduct or mismanagement (*h*).

(*a*) *British Empire Type Setting Co.* v. *Linotype Co.*, (1898) 79 L. T. 8.

(*b*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, (1859) 4 H. & N. 87.

(*c*) *South Hetton Coal Co.* v. *North-Eastern News Association*, (1894) 1 Q. B. 133; *Thorley's Cattle Food Co.* v. *Massam*, (1880) 14 Ch. D. 763.

(*d*) *Mayor, &c., of Manchester* v. *Williams*, (1891) 1 Q. B. 94.

(*e*) (1877) 2 Q. B. D. 496.

(*f*) But see *Smurthwaite* v. *Hannay*, (1894) A. C. 494.

(*g*) *Evans* v. *Harlow*, (1844) 5 Q. B. 624.

(*h*) *Ingram* v. *Lawson*, (1840) 6 Bing.

Slander. Slander is defamation communicated by spoken words, or other sounds (*a*), or by gestures (*b*). The law recognises a distinction between libel and slander, not, perhaps, resting on any satisfactory principle (*c*), but convenient as tending to restrain the multiplicity of actions. Slander directed against general character must, in order to be actionable, be defamatory in the same sense as a libel must be, and in addition must either impute a criminal offence, or some disease tending to exclude the party defamed from society, or, in the case of a woman, unchastity, or must have caused special damage. Slander directed against a man in his office or calling stands on the same footing as libel.

Imputing criminal offence. 1. The imputation of a criminal offence must be direct. Words of mere suspicion are not enough in themselves. It will be necessary for the plaintiff to satisfy the jury that under the circumstances such words were equivalent to an absolute affirmation of guilt (*d*). The exact offence need not be specified; words involving a general charge of criminality will suffice. Thus, "You have committed an act for which I can transport you," has been held an actionable expression (*e*). It is not necessary that the offence charged should be indictable, although such a notion has been widely prevalent and has found its way into the text books, probably from the fact that, by the common law, indictment was the almost universal method of procedure in criminal matters (*f*). Whether it is a slander to impute an offence punishable by fine only may be doubted. In the United

Offence need not be indictable.

Extraditable offence.

N. C. 212. So in *Burnet* v. *Wells*, (1700) 12 Mod. 420, it was held clearly actionable to say of a tradesman in the way of his trade, "He hath nothing but rotten goods in his shop." But it was agreed that if the words were that he had rotten goods no action would lie. In *Watkin* v. *Hall*, (1868) L. R. 3 Q. B. p. 299, Blackburn, J., says that it is actionable to say of a cattle dealer that he has disease among his cattle. But this seems doubtful. See too *Thorley's Cattle Food Co.* v. *Massam*, (1880) 14 Ch. D. 763; *Thomas* v. *Williams*, (1880) 14 Ch. D. 864. An action may lie for the malicious disparagement of a thing, causing special damage; but this stands on a different footing, see Ch. XVIII.

(*a*) The malicious hissing of an actor is a slander of him in the way of his profession: *Gregory* v. *Brunswick*, (1844) 6 M. & G. p. 959.

(*b*) *Per* Lord Abinger, *Gutsole* v. *Mathers*, (1836), 1 M. & W. p. 501.

(*c*) *Per Cur.*, *Thorley* v. *Lord Kerry*, (1812) 4 Taunt. pp. 364–5.

(*d*) *Tozer* v. *Mashford*, (1851) 6 Ex. 539; *Simmons* v. *Mitchell*, (1880) 6 App. Cas. 156.

(*e*) *Curtis* v. *Curtis*, (1834) 10 Bing. 477; see too *Francis* v. *Roose*, (1838) 3 M. & W. 191.

(*f*) *Webb* v. *Beavan*, (1883) 11 Q. B. D. 609,

States it is held to be actionable to impute a crime committed out of the jurisdiction (*a*). The point does not appear to have arisen in England. Insomuch as the ground on which an action is allowed for words imputing crime is that the slandered party may be thereby put in peril, the true principle would seem to be that if the alleged offence is of the class for which the party would be liable to extradition an action would lie, but if otherwise, not.

Imputing disease.

2. It has been said that the mere imputation of a contagious distemper is actionable "because all prudent persons will avoid the company of a person having such a distemper," and that it makes no difference whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted (*b*). This, however, appears not to be correct. No action lies where the words impute a mere ordinary infectious or contagious disease (*c*), and the rule for practical purposes may be taken to be that it is actionable to say of another that he has a venereal disease (*d*). Why this should be so is not quite clear. It cannot be because of the moral stigma, for it is not actionable to impute a past disease (*e*). To say of a man that he is a leper has been held actionable (*f*), but for this a good reason may be given, as leprosy at one time involved a loss of civil *status*.

Causing special damage.

3. If the speaking of any defamatory words causes special damage there is a good cause of action, not merely for the special damage, but for the defamation (*g*). The authorities are to a certain extent in conflict, but the better opinion seems to be that although mere words are not as a general rule regarded by the law, yet when their power for mischief has once been shown by the fact that they have caused actual damage they acquire an actionable quality, and general damage may be recovered in respect of them just as if they had been deliberately published in writing. The case of *Dixon* v. *Smith* (*h*)

General damage may be recovered.

(*a*) Townsend on Slander and Libel, 4th Ed. § 159.

(*b*) Bac. Ab. Slander, B. 2. See too *per* Blackburn. J., *Watkin* v. *Hall*, (1868) L. R. 3 Q. B. p. 399.

(*c*) *James* v. *Rutlech*, (1599) 4 Rep. 17; *Grimes* v. *Lovel*, (1698) 12 Mod. 242.

(*d*) *Bloodworth* v. *Gray*, (1844) 7 M. & G. 334.

(*e*) *Carslake* v. *Mapledoram*, (1788) 2. T. R. 473.

(*f*) *Taylor* v. *Perkins*, (1606) Cro. Jac. 244.

(*g*) *Allcott* v. *Millar's Karri & Jarrah Forests*, (1905) 91 L. T. 722, C. A.

(*h*) (1860) 5 H. & N. 450; 29 L. J. Ex. 125.

appears to support this view. The plaintiff in that case was a medical man and had been slandered by the defendant to one of his patients. He claimed as special damage the loss of that patient, and also a general falling off in his business, and recovered damages under both heads. It was held that he was not entitled to the latter damages because the general loss of patients could only be connected with the slander on the supposition that it had been repeated without the authority of the defendant (*a*), and for this the latter was not responsible. But it was also held that he was not limited to the loss of the single patient, "and the jury might consider what damage he had sustained in consequence of the speaking of the words" (*b*). He therefore was entitled to something for being defamed, in addition to the special damage actually proved.

4. By the common law an imputation by words upon the chastity of a woman was not actionable in itself. But now by the Slander of Women Act, 1891 (*c*), "words spoken which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

Slander on a man in his calling or office.

5. A person who pursues any honest calling may have an action if he be slandered in respect of it. A different view on this point is found to prevail in some of the earlier cases, for certain avocations were not considered of sufficient dignity that "an action should lie for scandalising" (*d*). But this doctrine is obsolete. In *Foulger* v. *Newcome* (*e*) it was decided that a gamekeeper, one of whose duties was to preserve foxes, had a good cause of action against the defendant for saying that he had poisoned foxes.

Occasional occupation.

In one case a distinction was drawn between a definitely recognised calling and a mere occupation; and it seems to have been considered that a man who made his living by entering, from time to time, into contracts for tolls could not sue if slandered in respect of such contracting. "A profession is a

(*a*) See below, p. 623.

(*b*) (1860) 5 H. & N. p. 453. In the L. J. report (p. 127). the words are "how much damage he had probably sustained through the special damage laid," the meaning of which is not very clear. See Buller, N. P. p. 7.

(*c*) 54 & 55 Vict. c. 51.

(*d*) Thus a postman, a midwife, and a schoolmistress have been regarded as incapable of suing, *Bell* v. *Thatcher*, (1676) 1 Vent. 275: see *Wharton* v. *Brook*, (1669) 1 Vent. 21.

(*e*) (1867) L. R. 2 Ex. 327.

continuing thing, but contracting to become a lessee of tolls is not a profession, and the habit of taking tolls is nothing" (*a*).

Honorary office.

It has been held that defamatory words spoken of a man in respect of an office purely honorary in its nature are not actionable if they merely impute incapacity (*b*). Nothing short of a charge of corruption or other criminal breach of duty will suffice (*c*). Thus to say of a town councillor that he is an habitual drunkard is not actionable (*d*). This distinction, which can hardly be considered satisfactory (*e*), rests, perhaps, on the ground that, as the holder of an honorary office has nothing to lose pecuniarily, he is not injured except by an imputation of misconduct which would render him liable to prosecution.

Where party has relinquished calling or office.

A plaintiff who alleges that he has been defamed in his vocation or office must show that he held the office or pursued the vocation both at the time of the publication complained of and at the time to which the imputations refer. In *Hopwood* v. *Thorn* (*f*) the plaintiff was a dissenting minister, and had previously carried on business in partnership with his brother-in-law. The defendant had said of him, "Mr. H. has cheated his brother-in-law of upwards of 2,000*l*. . . . I wonder how any respectable person can countenance such a man by his presence. I have been advising some other persons to go to the Wesleyan Chapel, as there they would hear plain honest men." The words were held not actionable insomuch as they did not impute that the plaintiff had misconducted himself as a minister, but was unfit to be a minister by reason of his having misconducted himself as a tradesman. In *Galwey* v. *Marshall* (*g*) the plaintiff was an unbeneficed clergyman, and he alleged as his cause of action words imputing to him incontinence; but the declaration was held bad for not alleging that he had at the time of the alleged

(*a*) *Per* Parke, B., *Bellamy* v. *Burch*, (1847) 16 M. & W. p. 593. This was only a *dictum*, and it may be doubted whether the view taken is not too narrow.

(*b*) *How* v. *Prinn*, (1702) 2 Salk. 694.

(*c*) *Per* De Grey, C.J., *Onslow* v. *Horne*, (1771) 3 Wils. p. 186; *Adams* v. *Meredew*, (1829 3 Y. & J. 219; *Booth* v. *Arnold*, (1895) 1 Q. B. 571. This seems to be the true ground of the decision in this last case, and not that the dishonesty imputed would have been a ground for removal from office; for mere loss of an honorary office is no legal damage.

(*d*) *Alexander* v. *Jenkins*, (1892) 1 Q. B. 797.

(*e*) See Starkie on Slander and Libel (2nd ed.), vol. i. p. 121.

(*f*) (1849) 8 C. B. 293.

(*g*) (1853) 9 Ex. 294.

slander any office or employment of temporal profit. Platt, B., however (*a*), expressed his doubts, on the ground that the plaintiff, though unbeneficed, had a *status* which might be imperilled by the slander. "If the slander had been of a barrister imputing to him such misconduct as would justify his being disbarred, it might be a good cause of action against the slanderer, though the slandered person never held a brief." It certainly would seem that if a man habitually follows a calling he ought not, simply because he temporarily fails of employment, to be deprived of a protection which may be of far more importance to him than to one who holds a position firmly established (*b*). The effect of the Clergy Discipline Act, 1892 (*c*), is practically to overrule the decision in *Galwey* v. *Marshall*, immorality (if proved) being not only a ground for eviction from a living in possession, but also, in the absence of the Royal pardon, a bar to any future preferment.

Slander must be directed to calling or office.

The language complained of must touch the plaintiff in his calling or office, it must not simply tend to his injury. In *Doyley* v. *Roberts* (*d*), the plaintiff, an attorney, was said to have "defrauded his creditors and been horsewhipped off the course at Doncaster." The jury found that the words "were not spoken of the plaintiff in his business as an attorney," but "that they had a tendency to injure him morally and professionally," and it was held that no action would lie (*e*). In another case the rule is laid down in language which has been frequently quoted. "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business" (*f*). The meaning, however, of the passage is not quite clear. To impute the lack of some general requisite is not enough by itself. It is not actionable to impute dishonest con-

Imputation on general character.

(*a*) *Ibid.* p. 301.

(*b*) In *Jones* v. *Stevens*, (1822) 11 Price, 235, the plaintiff sued for a libel on himself "in the way of his profession and business of attorney." He was on the rolls, but had not taken out a certificate, and it was held that he still retained his professional character and could be libelled in that character.

(*c*) 55 & 56 Vict. c. 32.

(*d*) (1837) 3 Bing. N. C. 835.

(*e*) In view of the recent case of *A. B.* v. *C. D.*, (1904) 7 F. 22, Ct. of Sess., the accuracy of this decision at the present day is open to question.

(*f*) *Per Cur.*, *Lumby* v. *Allday*, (1831) 1 C. & J. p. 305.

duct to a solicitor, unless in the way of his profession (*a*). So, to say of a trader that he is a regular prover under bankruptcy no doubt involves a charge of very dishonest conduct, but not necessarily a charge of dishonesty in the way of his trade (*b*). On the other hand the mere fact that, on the face of the words in question, the defamation is connected with the plaintiff's calling will not make them actionable. The connection must exist according to the reason of the matter, not simply in the mind of the defendant (*c*). The rule may, perhaps, be said to be that the imputation must necessarily, according to the minds of all reasonable people, be injurious to the plaintiff in his trade, profession, or office, and that, in order to do so, it must be necessarily connected with that profession, trade, or office, either by reason of the very nature of the charge or of the particular facts of the case. Thus, if a man is a trader, or engaged in a profession which involves the handling of money (*d*), words imputing insolvency are *per se* actionable, because they are necessarily defamatory of him in his trade (*e*) or vocation. But although defamation of a man in the way of his trade is actionable, mere depreciation of the goods in which he deals, although amounting to unfavourable comparison with those of a rival firm, will not *per se* sustain legal proceedings, unless there is proof of special damage (*f*), it being necessary, apart from such proof, in order to disclose reasonable cause of action in such case, for the plaintiff to show that the statement is not only commercially prejudicial to him, but that it is also *primâ facie* unlawful (*g*). And whether in any given case the words complained of are susceptible of a defamatory meaning, or are merely a disparagement of the goods, is for the jury (*h*). Again, it is not actionable to impute adultery to a physician unless the charge also involves a breach of professional confidence (*i*). A

Imputing insolvency to trader.

(*a*) *Doyley* v. *Roberts*, *supra*, p. 559; and see *Dauncey* v. *Holloway*, (1901) 2 K. B. 4.

(*b*) *Angle* v. *Alexander*, (1830) 7 Bing. 119.

(*c*) See *Lumby* v. *Allday*, (1831) 1 C. & J. 301; *Hopwood* v. *Thorn*, (1849) 8 C. B. 293.

(*d*) *A. B.* v. *C. D.* (1904) 7 F. 22 Ct. of Sess.

(*e*) *Brown* v. *Smith*, (1853) 13 C. B. 596; *Jones* v. *Littler*, (1841) 7 M. & W. 423.

(*f*) *Allcott* v. *Millar's Karri & Jarrah Forests, Ltd.*, (1905) 91 L. T. 722, C. A.

(*g*) *Hubbuck & Sons* v. *Wilkinson & Others*, (1899) 1 Q. B. 86, C. A.

(*h*) *Linotype Co.* v. *British Empire Type Setting Co.*, (1899) 81 L. T. 331.

(*i*) *Ayre* v. *Craven*, (1834) 2 A. & E. 2.

man may be very immoral, and yet a very capable physician; and though the charge might tend to his professional injury, it would not of necessity do so. It might affect one class of practice and not another. It is obvious that if the mere possible tendency of words were adopted as a test of their actionable character, any one following a respectable employment might have his action for words reflecting on his general respectability. It might be supposed, however, that in the case of any calling for which, according to the ordinary notions of society, a high moral character is requisite, the imputation of any serious breach of the moral law would be actionable. The contrary, however, has been maintained. "Some of the cases," says Lord Denman, "have proceeded to a length which can hardly fail to excite surprise, a clergyman having failed to obtain redress for the imputation of adultery, and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution" (*a*). It has, however, since been laid down (*b*) that the imputation on any beneficed clergyman of an offence rendering him liable to deprivation is actionable. Incontinence, drunkenness after monition, gross scandal, heinous crime—in short, all notorious offences and enormous sins, are grounds of deprivation (*c*), and, therefore, words imputing them, it would seem, are actionable. But where the plaintiff, a beneficed clergyman, was accused, first, of having cheated with regard to his clerical salary, and secondly, of having cheated generally, the first charge was held actionable and the second not (*d*).

Misconduct of clergyman.

Hitherto the endeavour has been to define what is actionable language, on the assumption that the meaning conveyed by that language is undoubted. This, however, is by no means always the case, and where the words do not speak for themselves, the plaintiff must be prepared to put the necessary gloss or innuendo upon them. They may be wholly or in part foreign, technical, or slang, and if so, they must be properly translated by suitable expert evidence into plain English. There are many doubtful

Language not defamatory on the face of it.

Innuendo; meaning of individual words.

(*a*) *Ayre* v. *Craven*, (1834) 2 A. & E. p. 7.

(*b*) *Galwey* v. *Marshall*, (1853) 9 Ex. 294.

(*c*) Ayliffe's Parergon, pp. 208–9

(*d*) *Pemberton* v. *Colls*, (1847) 10 Q. B. 461. In *Warr* v. *Jolly*, (1834) 6 C. & P. 497, Alderson, B., treated spoken words imputing intemperance to a dissenting minister as actionable.

words, which have crept into more or less general use, but have not yet obtained full recognition or become universally intelligible. With regard to these, it is in each instance for the Court to say whether it will attach a meaning itself, or whether it will take the opinion of those to whom the expression in question is familiar (*a*). A more liberal view is now taken than formerly of the extent of judicial knowledge of general facts and usages, and judges do not consider it necessary when on the bench to be ignorant of the various matters which, as men of the world, they know (*b*). In the same way historical and literary allusions, allegorical and figurative expressions, when they have passed so far into ordinary use that they may be taken to be intelligible to any person of fair sense and education, may be taken also to be intelligible to the Court and jury (*c*). But when the meaning of each individual term in the matter alleged to be defamatory is known, the question then remains, what is the construction of the whole, and whether it bears a defamatory meaning. It has, however, been held (*d*) that even where a plaintiff fails in establishing the innuendo, he is nevertheless entitled to damages awarded by a jury who find the words libellous *per se*.

Customary limitations on ignorance of court.

Meaning of language as a whole.

Where, however, the words uttered are not slanderous *per se*, and the result of their utterance was not one that could, with any degree of probability, have been within the contemplation of the defendant when he uttered them, even if special damage results, he will not in every case be held liable (*e*)

Libel or no libel, formerly question for judge.

Fox's Act.

In the last century, according to the great preponderance of authority (*f*), the meaning of a libel, as the meaning of every other document, was to be decided by the Court. However, by 32 Geo. III. c. 60, s. 1, it is provided that in indictments and informations for libel the jury may "give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed . . . to find the defendant or defendants guilty merely upon the

(*a*) *Barnett* v. *Allen*, (1858) 3 H. & N. 376.

(*b*) See *Ryder* v. *Wombwell*, (1868) L. R. 4 Ex. 32; *per* Brett, J.A., *Reg.* v. *Aspinall*, (1876) 2 Q. B. D. pp. 61–2.

(*c*) *Hoare* v. *Silverlock*, (1848) 12 Q. B. 625.

(*d*) *Fisher* v. *Nation Newspaper Co.* (1901) 2 Ir. R. 465.

(*e*) *Speake* v. *Hughes*, (1904) 1 K. B. 138, C. A.

(*f*) See *Rex* v. *Shipley*, (1784) 4 Doug. 73.

proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." Although this statute only applies to criminal proceedings, it has been followed, by analogy, in actions for libel, and no plaintiff can succeed unless he satisfies the jury that the publication sued on is defamatory. He must, also, of course, satisfy the judge that there is evidence, fit for their consideration, that is defamatory (*a*). In every case the evidence of the character of the alleged libel or slander will consist in the first place of the words themselves, in the second, of the surrounding facts and circumstances; and the inquiry will also be twofold: first, as to the natural meaning of the words on the face of them; secondly, as to the modification of that meaning by the remaining evidence. Thus, although it is not in itself *ex facie* libellous for a false birth notice to appear in a newspaper, the appearance of such notice within two months of the date of marriage is defamatory as imputing immorality to the plaintiff (*b*). In construing the language of an alleged libel, two rules are to be observed. First of all, the whole matter is to be taken into account. The plaintiff is not permitted to pick out this or that sentence which he may consider defamatory, for there may be other passages which will take away their sting. Bane and antidote may be found together; and it is for the jury to say whether, taking the publication as a whole, it is injurious to the plaintiff (*c*). Secondly, "words are to be taken in the sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them" (*d*). This rule, which was laid down as long ago as the time of Lord Macclesfield, was very imperfectly observed for the rest of the century, and it is only in comparatively recent times that the perverse subtlety of special pleading by which this branch of the law was especially encumbered has altogether disappeared.

Judge still to decide as to evidence of libel.

How language construed.

As a whole.

Natural and obvious sense.

Every communication said to be defamatory may be

(*a*) See below, p. 568.

(*b*) *Morrison* v. *Ritchie*, (1902) 4 F. 645, Ct. of Sess.

(*c*) *Chalmers* v. *Payne*, (1835) 2 C. M. & R. 156.

(*d*) *Per Cur.*, *Harrison* v. *Thornborough*, (1713) 10 Mod. p. 198; see *Hankinson* v. *Bilby*, (1847) 16 M. & W. 442; *Roberts* v. *Camden*, (1807) 9 East, 93.

(a) defamatory on the face of it; (b) ambiguous; or (c) innocent on the face of it.

Language *primâ facie* defamatory.

(a) Language is defamatory on the face of it either when the defamatory meaning is the only possible meaning, or when it is the only natural and obvious meaning. If A. says that B. has taken, stolen, and carried away the goods of C., his only possible meaning is that B. has committed the offence of larceny. But if he says that B. has robbed C., his only natural and obvious meaning is the same. It is, indeed, possible to suggest that A. by the word "robbed" may merely have intended to suggest that B. had acted unfairly by C. in some pecuniary matter, but if so, it is for him to prove it. The words by themselves give a good cause of action for slander as imputing a crime (*a*).

Defamatory matter published as hearsay.

Here it may be as well to observe, that matter, which is otherwise obviously defamatory, will not be the less actionable because it is put forward as matter of rumour, hearsay, or supposition. If the rule were otherwise every dealer in defamation would have free range on the lenient condition of always using some such preface to his libel as "I am informed," "I am of opinion" (*b*).

Ambiguous language.

(b) Language is ambiguous where it is equally capable on the face of it of two meanings, the one defamatory and the other innocent. In a case of slander the imputation that the plaintiff is "foresworn" is ambiguous. It imputes the taking of a false oath, but the oath may have been in a judicial proceeding or it may not. In the latter alternative the words are not actionable, in the former they are (*c*). So, if it is said of a person that he has set his house on fire, it may be that what he has done is a felonious act, or it may be that it is a foolish and careless act. The words are ambiguous and of themselves not actionable as conveying the imputation of a criminal act (*d*), In *Goldstein* v. *Foss* (*e*) the plaintiff sued in respect of an alleged libel, the sting

(*a*) *Tomlinson* v. *Brittlebank*, (1833) 4 B. & Ad. 630.

(*b*) See *Harrison* v. *Thornborough*, (1713) 10 Mod. 196; *Watkin* v. *Hall*, (1868) L. R. 3 Q. B. 396; *Jenner* v. *A'Beckett*, (1871) L. R. 7 Q. B. 11; *M'Pherson* v. *Daniels*, (1829) 10 B. & C. 263; *Botterill* v. *Whytehead*, (1879) 41 L. T. N. S. 588. As has been pointed out, however, it is no slander to impute mere suspicion of a felony; see above, p. 555.

(*c*) *Holt* v. *Scholefield*, (1796) 6 T. R. 691.

(*d*) *Sweetapple* v. *Jesse*, (1833) 5 B. & Ad. 27.

(*e*) (1828) 6 B. & C. 154.

of which was that he and certain other persons were reported to a society of guardians for the protection of trade against swindlers "as improper to be proposed to be ballotted for as members thereof," and the words were held not defamatory in themselves. They, no doubt, might be taken to impute that the plaintiff was an improper person to be proposed by reason of his bad character, but they were equally consistent with the supposition that the ground of his exclusion was some arbitrary rule involving no question of character (*a*).

Language *primâ facie* innocent.

(c) Language is innocent on the face of it when there is no possible defamatory meaning which the words taken by themselves can bear, or when the natural and obvious meaning is innocent, though it may be possible for ingenious malevolence to read between the lines and interpolate some far-fetched suggestion. In *Mulligan* v. *Cole* (*b*) the plaintiff had been a teacher at the Walsall Science and Art Institution. His employment terminated, and he subsequently became connected with an establishment similar in character and name. The defendants then published an advertisement stating that his connection with the Walsall Science and Art Institute had terminated, and that he was "not authorised to receive subscriptions on its behalf." The plaintiff sued on this as a libel, the innuendo laid being "that he had falsely pretended to be authorised to receive subscriptions." But it was held that the advertisement bore no such meaning of itself, and there being no further evidence, the plaintiff was nonsuited (*c*). In *McCann* v. *Edinburgh Roperie Co.* (*d*), the defendants sent a post-card to the plaintiff bearing the words "Settlement. If you do not remit by return the matter will be handed to our solicitors." It was held that the words could not of themselves bear the innuendo that the plaintiff was unable or unwilling to pay his debts. In *Nevill* v. *Fine Arts and General Insurance Co.* (*e*), the libel complained of was contained in a circular addressed to the holders of policies which had been

(*a*) See too *Gompertz* v. *Levy*, (1838) 9 A. & E. 282: *Simmons* v. *Mitchell*, (1880) 6 App. Cas. 156.

(*b*) (1875) L. R. 10 Q. B. 549.

(*c*) See also *Hunt* v. *Goodlake*, (1873), 43 L. J. C. P. 54; *Capital & Counties Bank* v. *Henty*, (1880–2) 5 C. P. D. 514; 7 App. Cas. 741.

(*d*) (1889) 28 L. R. Ir. 24. See too *Searles* v. *Scarlett*, (1892) 2 Q. B. 56.

(*e*) (1895) 2 Q. B. 156.

effected with the defendants through the agency of the plaintiff, which circular stated that "the agency of Lord W. Nevill (the plaintiff) has been closed by the directors." The innuendo laid was that he had been dismissed for some reason discreditable to him. At the trial a clerk of the defendants proved that the circular as originally drafted stated that the plaintiff had resigned his agency, and that its form was altered with the object of inducing the policy holders to continue insuring directly with the defendants. The Court of Appeal, while of opinion that the circular on the face of it was incapable of the defamatory meaning suggested, thought that the evidence of the clerk was sufficient to warrant the judge in leaving the question to the jury. It is somewhat difficult to reconcile this case with the general current of authority. In considering whether a document is libellous or not the true question would seem to be, not what the writer intended, but what the average reader, knowing all the circumstances known to the addressee, would understand it to mean.

Evidence in case of ambiguous or innocent language.

If the language is defamatory on the face of it, the plaintiff has of course no further difficulty; it speaks for itself, and he need allege, and in the first instance, prove nothing more. If the language is ambiguous, it is equally consistent with the negative and affirmative of the proposition which the plaintiff has to establish, namely that he has been defamed, and therefore, by proving simply the language he does not prove his case (*a*). *A fortiori* does he fail when the language is naturally innocent. In both these cases the plaintiff must bring forward additional facts and circumstances to specially point the meaning of the language where ambiguous, or specially qualify and alter its meaning where innocent. There are no words which may not possibly be proved defamatory. Words may be ironical, and used in a sense exactly opposite to that which is natural. They may by hidden reference convey an imputation that is altogether unconnected with their apparent meaning. The words, "I saw you in your red coat doing duty," were in one case held to convey an imputation of fraud and insolvency on a trader (*b*).

Old form of pleading.

Formerly the plaintiff, when unable to rely on the defamatory

(*a*) See for this principle, *Phillipson v. Hayter*, (1870) L. R. 6 C. P. 38.

(*b*) *Arne* v. *Johnson*, (1712) 10 Mod. 111.

matter alone, had not merely to plead the innuendo which he wished to establish, but also a *colloquium* or prefatory averment of the various circumstances which he relied on as proving that innuendo. He had to show on the face of his declaration with the minutest particularity a cause of action, and, if he failed to do so, it would be held bad on demurrer or motion for arrest of judgment. Great injustice was thus sometimes done to a litigant who lost his action by a trifling slip of his pleader, and in consequence by the Common Law Procedure Act of 1852 (*a*) all necessity for the *colloquium* was removed. Thenceforth any words capable on the face of them of a defamatory meaning, even though ambiguous, might be pleaded without innuendo (*b*).

Effect of alteration in pleading.

Laxity of proof.

Licence of pleading introduced laxity of proof, and many *dicta* are to be found, to the effect that ambiguous language fairly capable of a defamatory meaning may be taken in such meaning without further evidence (*c*). This view was expressly adopted as the ground of decision in *Hart* v. *Wall* (*d*). The plaintiffs sued on certain letters which were "susceptible of two constructions, the one an innocent, the other a libellous construction" (*e*). No evidence seems to have been given except of the publication. The plaintiffs having been nonsuited, the nonsuit was set aside on the ground that the letters being "reasonably susceptible" of a defamatory construction ought to have been submitted to the jury.

Security for costs in libel.

It may be convenient here to point out that insolvency and nonsuit in a former action for the same libel against another defendant have been held insufficient grounds for ordering a plaintiff in a libel action to find security for costs (*f*).

Lord Blackburn's opinion.

The case of *Hart* v. *Wall* is, however, obviously disapproved of by Lord Blackburn (*g*), who points out that the enactment in question was intended only to alter the form of pleading, and not the substance of proof. The plaintiff must persuade the jury to find

(*a*) 15 & 16 Vict. c. 76, s. 61. As to the effect of this, see *Watkin* v. *Hall*, (1868) L. R. 3 Q. B. 396.

(*b*) *Fray* v. *Fray*, (1864) 17 C. B. N. S. 603.

(*c*) *Per* Erle, C.J., *ibid.* p. 605; *per* Kelly, C.B., *Cox* v. *Lee*, (1869) L. R. 4 Ex. p. 288; *per* Lush, J., *Mulligan* v. *Cole*, (1875) L. R. 10 Q. B. p. 550.

(*d*) (1877) 2 C. P. D. 146.

(*e*) *Per* Lord Coleridge, C.J., *ibid.* p. 149.

(*f*) *Le Mesurier* v. *Ferguson*, (1903) 20 T. L. R. 32, C. A.

(*g*) *Capital & Counties Bank* v. *Henty*, (1880–2) 7 App. Cas. pp. 776–82

that he has been defamed, but he must also satisfy the judge that there is evidence to justify such a finding, and, as already pointed out, language equally capable of two significations affords in itself no evidence of one signification rather than the other.

Publication.

Publication of defamatory matter, as far as regards civil proceedings, is only considered to take place when there is a publication to some person other than the party defamed. A husband and a wife are so far regarded as one that no publication can be made by means of a communication from one to the other (*a*). But defamatory matter may be published to the husband or wife of the person who is the subject of the defamation (*b*). A plaintiff may rely on a publication to his own agent, and the fact that such agent invited and procured the publication will not affect the defendant's liability (*c*). A libel may be published by reading the contents of the writing to a third person, or allowing him to read them for himself (*d*). It is by no means necessary for a plaintiff in all cases to prove directly that the incriminated matter was brought to the actual knowledge of any one. If he makes it a matter of reasonable inference that such was the fact, he establishes a sufficient *primâ facie* case. The posting of a letter is good evidence of a publication to the party to whom the letter was addressed (*e*). The circulation of copies of a book, containing libellous matter by a lending library is evidence of publication to the subscribers (*f*). The despatch of a postcard or telegram is good evidence of publication to the various post-office officials through whose hands it passes, for they have an opportunity of becoming acquainted with the contents (*g*). So, ordinarily, the printing of a libel imports, in the first instance, a publication to the persons employed in printing (*h*). So it

Primâ facie evidence.

(*a*) *Wennhak* v. *Morgan*, (1888) 20 Q. B. D. 635; and see *Young* v. *Young*, (1903) 5 F. 330, Ct. of Sess.

(*b*) *Wenman* v. *Ash*, (1853) 13 C. B. 836.

(*c*) *Duke of Brunswick* v. *Harmer*, (1850) 14 Q. B. 185.

(*d*) 5 Rep. p. 125b; see *Hearne* v. *Stowell*, (1840) 12 A. & E. 732. But see *Smith* v. *Wood*, (1813) 3 Camp. 323.

(*e*) *Warren* v. *Warren*, (1834) 1 C. M. & R. 250.

(*f*) *Vizitelly* v. *Mudie's Library*, (1900) 2 Q. B. 170, C. A.

(*g*) *Williamson* v. *Freer*, (1874) L. R. 9 C. P. 393.

(*h*) *Per Cur.*, *Baldwin* v. *Elphinston*, (1774) 2 W. Bl. p. 1038. See, however, *per Cur.*, *Watts* v. *Fraser*, (1837) 7 A. & E. p. 233.

has been held that publication of a newspaper may be evidenced by the delivery to the stamp office (*a*). But in all these cases there is only a presumption which may be rebutted, for, if the person to whom publication is alleged upon being called denies that the defamatory matter came to his knowledge the proof fails (*b*).

Joint publication.

The act of publication may be a joint tort, as where in pursuance of a common design one composes, another prints, and another distributes a libel. Moreover, a man may, without any direct participation in the publication, make himself liable for it. "Not only he who publishes the libel himself, but also he who procures another to do it, is guilty of the publication" (*c*). Therefore, where at a board of guardians remarks defamatory of the plaintiff were made, and the chairman expressed a hope that the press would take notice of them, it was held that he was liable for the publication in a newspaper of a fair report of what occurred (*d*). And although a defendant is not generally liable for an unauthorised repetition or republication of defamatory matter (*e*), yet if he publishes to a person who is under a moral obligation to repeat it to some one else, he causes and procures this second publication, and is answerable for it (*f*). It is not merely in virtue of a particular authority given that a man may be responsible for a libel published by another. The maxim of *respondeat superior* applies, and if a servant in the due course of employment publishes a libel, the master can be sued. Therefore, if a libel is sold in a book shop or published in a newspaper, the proprietor of the shop or paper is civilly liable (*g*), whether he acts through an agent or in his own person. It is sometimes said that a slander cannot be a joint tort (*h*), but this, it would seem,

Authorised repetition.

Publication by agent.

Joint slander.

(*a*) *Rex.* v. *Amphlit*, (1825) 4 B. & C. 35.

(*b*) *Clutterbuck* v. *Chaffers*, (1816) 1 Stark. 471. There are some *dicta* in *Rex.* v. *Burdett*, (1820) 4 B. & Ald. 95, which taken by themselves would seem to show that the posting of a letter is not merely evidence of publication but necessarily a publication. However, the real meaning appears to be that the posting is the commencement of the publication which becomes complete when the communication reaches the addressee.

(*c*) Bac. Ab. Libel, B. 2.

(*d*) *Parkes* v. *Prescott*, (1869) L. R. 4 Ex. 169.

(*e*) *Ward* v. *Weeks*, (1830) 7 Bing. 211; see below, pp. .

(*f*) *Derry* v. *Handley*, (1867) 16 L. T. N. S. 263.

(*g*) See *per* Lush, J., *Reg.* v. *Holbrook*, (1877) 3 Q. B. D. pp. 69–70.

(*h*) *Chamberlain* v. *White*, (1622) Cro. Jac. 647; *Coryton* v. *Lithebye*, (1671) 2 Wm. Saund. 117c. in notes.

only means that two persons who separately publish slanders conveying identical imputations cannot be jointly sued.

Publication by servant of corporation.

A corporation is liable for defamation uttered or published by its servant if the circumstances under which the defamation was published, were such as to bring it within the scope of the servant's employment (*a*).

Publication must be intentional.

The publication of a libel must be intentional, either on the part of the defendant or of somebody for whom he is responsible. The publication of a libel cannot be said to be intentional unless the person publishing it intended to issue the particular document in which the defamatory matter was contained, and also knew, or had reasonable means of knowing, the nature of its contents. But intention may be implied by neglect to take precaution against publication, and where this is alleged, the onus of proving absence of negligence in the dissemination of the libel is on the defendant (*b*).

Mistake as to identity of document.

If the defendant, having in his possession a document containing libellous matter, deliver it to a person by mistake for another and innocent document, he is not liable, even though he knew that the particular document which he in fact issued was libellous (*c*).

Ignorance of contents of document.

Again, if the defendant does not know, and has no reasonable means of knowing, and is under no legal obligation to know what he is publishing, though the matter published is libellous, yet his publication is innocent. He has not intentionally published a libel. Thus, the postman who delivers a libellous letter, although in one sense he shares in the publication, is not answerable; nor is anyone who is a mere vehicle of communication (*d*). On this principle the vendor of a newspaper in the ordinary way of business, although *primâ facie* liable for every libel which it may happen to contain, is excused if he can prove that he did not know that it contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know and had no ground for supposing that it was likely to contain defamatory matter (*e*). A somewhat curious case of

(*a*) *Citizens Life Assurance Co.* v. *Brown*, (1904) A. C. 423.

(*b*) *Vizitelly* v. *Mudie's Library*, (1900) 2 Q. B. 170.

(*c*) *Rex* v. *Paine*, (1696) 5 Mod. 163.

(*d*) Starkie on Slander and Libel, 2nd ed., vol. i., p. 227; *Day* v. *Bream*, (1837) 2 Moo. & R. 54.

(*e*) *Emmens* v. *Pottle*, (1885) 16 Q. B. D. 354. As regards the liability

publication free from defamatory intent and therefore innocent is found in the American reports. A writer had communicated to the defendant an article which was, in fact, defamatory of the plaintiff, but which appeared on the face of it to be a mere fancy sketch. This the defendant published in his newspaper without having any reason to be aware of its true nature, and it was held that he had a good defence, since he had done nothing which afforded any evidence of wilful wrong towards the plaintiff (*a*).

Publication by mistake to wrong person.

If, however, the defendant knows, or had the means of knowing the nature of the document which he issues, and issues it knowing that he is doing so, he will be liable, none the less because he issues it to a person to whom he had no intention of publishing it. Thus where the defendant, intending to send a libel to the plaintiff, sent it by mistake to a third person, it was held that this mistake did not affect the nature of his act. He intended a publication for which he was criminally, though not civilly, answerable, and he could not defend himself merely by saying that he did not intend to give the plaintiff a cause of action (*b*). A person who so issues libellous matter will be responsible even though he is under the mistaken impression that he is communicating it to a person to whom the communication is privileged. And this is so whether the mistake is as to the person to whom the communication is made, or as to the existence of facts which would give rise to a right or duty to make it. If the defendant writes defamatory matter in a letter to A., but by mistake places it in an envelope addressed to B., who receives and reads it, he will be liable even though the publication of the letter to A. would have been privileged (*c*). And he will equally be liable if, sending it to the person to whom he intended to send it, he made a mistake in supposing that that person had any such interest or

of the vendor of a monthly magazine, see *Chubb* v. *Flanagan*, (1834) 6 C. & P. 431. It is obvious that the vendor of a book would have greater difficulty in establishing his innocence than the vendor of a mere fugitive publication, and *à fortiori* the proprietor of a "select" library.

(*a*) *Smith* v. *Ashley*, (1846) 11 Metcalfe, 367 (Massachusetts).

(*b*) *Fox* v. *Broderick*, (1864) 14 Ir. C. L. R. 453.

(*c*) This follows from the judgments in *Hebditch* v. *MacIlwaine*, (1894) 2 Q. B. 54, where the decision in *Tompson* v. *Dashwood*, (1883) 11 Q. B. D. 43, to the contrary, was overruled.

duty in the matter as would made the communication privileged (*a*) In all such cases the defendant issues the libellous matter at his peril.

Letter opened by third person.

Although, as a general rule, when a letter is addressed to a particular person, the writer is not responsible except for a publication to that person, yet, if he knows that in the ordinary course of things it may be opened by someone else (*b*), he must take the risk of such an event happening, If he wants to protect himself he should write "private" on the envelope (*c*).

Lunacy, when a defence.

Whether a lunatic is liable for the publication of a libel "depends upon whether he is sane enough to know what he is doing" (*d*). It would seem clear that if a person is so far out of his mind that he does not know what he is about, he cannot be said to act intentionally, and therefore cannot be responsible for any defamatory matter which he may publish. Of course lunacy does not give a general charter to commit wrongs. A lunatic may be even criminally liable if his lunacy have no bearing on the particular act in question.

Two defences, justification and privilege.

When the plaintiff has once proved against a defendant an intentional publication of defamatory matter, he has established for the time being his case. It is then for the defendant to show either that his charge is not malicious or that it is not false. "To constitute a good defence . . . the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. It is competent to the defendant, upon the general issue, to show that the words were not spoken maliciously by proving that they were spoken on an occasion or under circumstances which the law on grounds of public policy allows, as in course of a parliamentary

(*a*) *Hebditch* v. *MacIlwaine*, *supra*.

(*b*) *Pullman* v. *Hill*, (1891) 1 Q. B. 524, where a letter addressed to a firm was opened by their clerk. The case of *Reg.* v. *Adams*, (1888) 22 Q. B. D. 66, went considerably further. There the prisoner wrote a letter to a girl, addressing it to her by her initials. The letter never reached her, having been opened by her mother who happened to have the same initials—a fact which was *à priori* highly improbable.

(*c*) *Per* Lopes, L.J., *Pullman* v. *Hill*, (1891) 1 Q. B. p. 529. As to what will amount to "publication" in the case of a postcard, see *Sadgrove* v. *Hole*, (1901) 2 K. B. 1, C. A.

(*d*) *Per* Lord Esher, M.R., *Emmens* v. *Pottle*, (1885) 16 Q. B. D. p. 356.

or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action he must plead that matter specially, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment) but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess" (*a*). The two defences indicated in this passage are known as justification, whereby a defendant proves the truth of the matter published, and privilege, whereby he shows the absence of malice. And first of justification.

Justification.

It has been already pointed out that a defamatory publication is to be understood in the sense which a jury properly attaches to it. It is in this sense, therefore, that a defendant must prove the matter true. The allegations of which the plaintiff complains may be either statements of fact or matters of comment or inference. The defendant need not prove the literal truth of every fact which he has stated. It is enough if he prove the substantial truth of every material fact (*b*). It must be considered what the gist of the matter is, and if there is no variation between the allegations to be justified and their proof sufficient to make any difference in the judgment of a reasonable man, the defendant is entitled to succeed. If it be alleged of a plaintiff that he has been convicted of an offence and sentenced to three weeks' imprisonment, whereas it appears that the term imposed was only fourteen days, it is a question for the jury whether the truth of the imputation is substantially made out (*c*). But on the other hand a printed statement, by the defendants, that the plaintiff had been fined or in the alternative was sentenced to a term of imprisonment with hard labour, when in fact no hard labour had been imposed, has been held actionable (*d*). Where

Facts alleged must be substantially true.

(*a*) *Per* Littledale, *M'Pherson* v. *Daniels*, (1829) 10 B. & C. p. 272. Of course this passage is not now an authority as to the form of pleading.

(*b*) As to the *quantum* of evidence that is admissible, see *Hewson* v. *Cleeve*, (1904) 2 Ir. R. 536, C. A.

(*c*) *Alexander* v. *North-Eastern R. Co.*, (1865) 6 B. & S. 340.

(*d*) *Gwynn* v. *South-Eastern R. Co.*, (1868) 18 L. T. 738.

the libel was that a serious misunderstanding had taken place between a congregation and their minister "in consequence of invectives publicly thrown from the pulpit by the latter against a young lady," and that the matter was to be seriously taken up, and the plea of justification only dealt with the throwing of invectives, it was held sufficient, since the whole "sting of the charge" was misconduct in the pulpit and abuse of pastoral authority, and the allegations not covered by the plea did not affect the plaintiff's character (*a*).

Every material fact must be justified.

But everything in the defamatory publication which adds weight to the imputation is material (*b*). Where the plaintiff, a schoolmaster, sued in respect of a libel, in which it was said that his school had been empty for seven years, that his violent conduct was the cause of its decay, and that he had violently treated some of his pupils, a plea which justified only the first and third of the allegations was held insufficient (*c*). So, where a criminal offence is imputed, the defendant, if he seeks to justify, must prove every circumstance of aggravation charged by him, although not altering the legal quality of the crime (*d*). If it is alleged against a man that he has actually committed a crime, the mere proof that he was convicted of it does not establish a justification, for his prosecution was *res inter alios acta*, and does not estop him from asserting his innocence against a stranger (*e*).

Justification of comment.

To *justify* (*f*) comment a state of facts must be proved to exist which puts it beyond all question that the comment is well founded. The defamatory matter frequently consists partly of statements of fact, partly of observations founded on such statements. If the comment is merely such as inevitably arises out of the facts, proof amounting to a justification of the statement is a justification also of the comment. If it goes beyond this it asserts, by implication, further facts, which must also be shown to be true. Where the libel charged the plaintiff with fraudulent conduct in respect of a certain memorandum,

(*a*) *Edwards* v. *Bell*, (1824) 1 Bing. 403; see too *Clarke* v. *Taylor*, (1836) 2 Bing. N. C. 654.

(*b*) *Weaver* v. *Lloyd*, (1824) 2 B. & C. 678.

(*c*) *Smith* v. *Parker*, (1844) 13 M. & W. 459.

(*d*) *Helsham* v. *Blackwood*, (1851) 11 C. B. 111.

(*e*) *Per* Bramwell, L.J., *Leyman* v. *Latimer*, (1878) 3 Ex. D. p. 354.

(*f*) For the right of "licentious" comment, see below, p. 605.

and went on to say that there was nothing "for him too base to be guilty of," and the justification was that the plaintiff had falsely and fraudulently denied his signature to the memorandum, it was held that this covered the whole libel, since the comment simply meant that the defendant had acted very basely; which was really not a new imputation, but a different way of putting the same imputation (*a*). But where the plaintiff sued on a libel headed "Horse-stealer," and alleging various circumstances tending to throw suspicion on the plaintiff of the larceny of a horse, and the plea justified everything except the heading, it was held insufficient, since the plaintiff's actual guilt, imputed by the word "horse-stealer," was not a necessary inference from the truth of the rest of the libel (*b*).

A defence of "fair comment" is not, however, admissible in a libel action founded on a criticism imputing, unwarrantably, dishonourable and sordid motives to the plaintiff (*c*).

Imputation must be dealt with as a whole.

Where there are various distinct imputations made it is open to a defendant to justify as to some only (*d*). But if they all so hang together as to make but one charge, they must be dealt with as a whole. Where the libel on the plaintiff, a proctor of the Probate Court, was that he had been suspended three times from practice, the defendant was allowed to make a limited plea of one suspension on the ground that the libel contained in fact three allegations of three suspensions (*e*). Merely to show that a charge, though exaggerated, was not altogether without foundation, may be a reason for mitigating damages, but cannot afford an absolute defence.

Privilege absolute and qualified.

Under certain circumstances it is excusable to publish matter which is both false and defamatory. Such excuse is termed privilege. Privilege is of two kinds: qualified, which is only *primâ facie* a ground of defence; absolute, which is a complete bar to an action. Absolute privilege is judicial (*f*), parliamentary,

Absolute privilege.

(*a*) *Tighe* v. *Cooper*, (1857) 7 E. & B. 639; see also *Morrison* v. *Harmer*, (1837) 3 Bing. N. C. 759.

(*b*) *Mountney* v. *Watton*, (1831) 2 B. & Ad. 673.

(*c*) *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(*d*) But his plea of justification must leave no doubt as to what is justified and what is not (*Fleming* v. *Dollar*, (1889) 23 Q. B. D. 388).

(*e*) *Clarkson* v. *Lawson*, (1830) 6 Bing. 587.

(*f*) A commission of enquiry appointed by a bishop under the Pluralities Acts, 1838 and 1885, is a judicial tribunal for

or official. It is impossible that litigation and public business can be carried on without the character of individuals being constantly called in question. If every one thus impeached were permited to pursue his legal remedy, not merely would freedom of communication in matters where it is vitally necessary be rendered impossible, but a perennial source of litigation would be opened. Accordingly, on occasions absolutely privileged not merely are those protected who act in the honest discharge of their legal right or duty, but also those who abuse the opportunity with malicious motive and deliberate untruthfulness to malign their neighbours; and this because it is impossible to devise a shield sufficiently broad to cover the former without also including the latter. "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law, but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who are merely discharging their duty. It must always be borne in mind . . . that it is intended to protect persons acting *bonâ fide*, who under a different rule would be liable, not, perhaps, to verdicts and judgments against them, but to the vexation of defending actions" (*a*).

Principle of absolute privilege.

In judicial proceedings.

I. With regard to judicial proceedings, "neither party, witness, counsel, jury, or judge, can be put to answer civilly, or criminally, for words spoken in office" (*b*). "The authorities are clear, uniform, and conclusive, that no action of slander or libel lies whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law" (*c*).

this purpose (*Barratt* v. *Kearns*, (1905) 1 K. B. 504, C. A.)

(*a*) *Per* Fry, L.J., *Munster* v. *Lamb*, (1883) 11 Q. B. D. p. 607.

(*b*) *Per* Lord Mansfield, C.J., *Rex* v. *Skinner*, (1761) Lofft, p. 56; and this privilege extends alike to Supreme and inferior Courts (*Primrose* v. *Waterston*, (1902) 4 F. 783, Ct. of Sess.); and see *A. B.* v. *C. D.* (1904) 7 F. 72, Ct. of Sess.

(*c*) *Per* Kelly, C.B., *Dawkins* v. *Lord Rokeby*, (1873) L. R. 8 Q. B. p. 263. A commission of enquiry under the Pluralities Acts, 1838 and 1885, is a judicial tribunal (*Barratt* v. *Kearns*, (1905) 1 K. B. 504, C. A.). As to military Courts of inquiry, see that case and *Dawkins* v. *Prince Edward of Saxe-Weimar*, (1876) 1 Q. B. D. 499; County Court Judges, *Scott* v. *Stansfield*, (1868) L. R. 3 Ex. 220; coroners, *Thomas* v. *Churton*, (1862) 2 B. & S. 475; witnesses, *Seaman* v. *Netherclift*, (1876) 2 C. P. D. 53; *Kennedy* v. *Hilliard*, (1859) 10 Ir. C. L. R. 195; advocates, *Munster* v. *Lamb*, (1883) 11 Q. B. D. 588; bankruptcy registrars, *Ryalls* v. *Leader*,

There can be no judicial proceeding where there is nothing before a Court with which it has jurisdiction to deal (*a*). If a judicial person while sitting upon the bench thinks fit of his own motion to deliver an harangue on any topic which he conceives to be of public interest, he does so at his peril. If, however, any application is made which on the face of it is not unfit to be heard, in order to see whether it is within the competence of the Court or not, the inquiry then instituted is a judicial proceeding, though the result be to show that there is no jurisdiction to deal with the matter (*b*). Nor is the absolute privilege attendant upon judicial proceedings avoided by the commission of some unintentional irregularity. Thus where an arrangement by consent was wrongly registered by the solicitor to one of the parties as a judgment of the Court, and was subsequently set aside, it was held that no action for libel would lie against him (*c*).

What are judicial proceedings.

It is not merely with respect to the hearing in open Court that there is absolute privilege, but also with regard to every step in the conduct of a legal proceeding. For instance, an affidavit filed in support of some interlocutory application can in no case give a cause of action (*d*). But where something is done as a mere preliminary to setting a Court in motion, as for instance where an information is laid, or notice of action is given, it may be doubted whether there is more than a qualified privilege, which may be defeated by proof of malice (*e*).

Relevancy.

In any proceeding *coram judice* the judge, advocate, or other

(1866) L. R. 1 Ex. 296. It seems to be assumed by 11 & 12 Vict. c. 44, s. 2, that an action lies against a magistrate for anything done maliciously in his office, that, therefore, he has not an absolute privilege. The true view, however, probably is, that a magistrate has just the same protection as any other judicial person: see below, p. 735. A County Council sitting to grant music and dancing licences is not a Court so as to cover with absolute privilege defamatory statements made in the course of the proceedings (*Royal Aquarium & Summer & Winter Garden Society, Ltd.*, v. *Parkinson*, (1892) 1 Q. B. 431).

(*a*) See *Paris* v. *Levy*, (1860) 9 C. B. N. S. 342; *per cur.*, *Lewis* v. *Levy* (1858) E. B. & E. p. 555. The adjudication of a justice or other competent authority upon an application under the Lunacy Act, 1890, is a judicial proceeding (*Hodson* v. *Pare*, (1899) 1 Q. B. 455).

(*b*) *Reg.* v. *Bolton*, (1841) 1 Q. B. 66; *per* Lord Coleridge, C.J., *Usill* v. *Hales*, (1878) 3 C. P. D. p. 328.

(*c*) *MacCabe* v. *Joynt*, (1901) 2 Ir. R. 115, Q. B. D,

(*d*) *Revis* v. *Smith*, (1856) 18 C. B. 126; *Henderson* v. *Broomhead*, (1859) 4 H. & N. 569.

(*e*) *Bank of British North America* v. *Strong*, (1876) 1 App. Cas. 307; see below, p. 641.

person who claims the privilege is protected while acting "in office." He may in the discharge of his function publish matter which is "uncalled for, immaterial, irrelevant, and impertinent" (*a*), and yet not be liable to answer for it. It would seem, however, that the language, to be privileged, though irrelevant, yet ought to have some reference to the subject-matter of inquiry; but even this restriction has been treated as open to question. "Suppose," it has been said, "while a witness was in the box a man were to come in at the door and the witness were to exclaim 'that man picked my pocket,' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything which a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action" (*b*).

By 51 & 52 Vict. c. 64, s. 2, fair and accurate and contemporaneous reports in newspapers of judicial proceedings are absolutely privileged (*c*).

Parliamentary proceedings.

2. Everything published in the due course of parliamentary proceedings is absolutely privileged. No member of Parliament can be called on to answer for anything which he says in his place (*d*). The Houses of Parliament are for certain purposes Courts of Judicature. They hear counsel, and call parties and witnesses before them, and all that passes on such occasions is as fully protected as the proceedings in an ordinary Court of Law (*e*). They receive petitions and distribute among their members documents and papers, and into such publications the Courts cannot inquire (*f*). But at common law there is no parliamentary privilege for publishing defamatory matter to the outside world (*g*). However, by 3 and 4 Vict. c. 9, ss. 1, 2, a

(*a*) *Scott* v. *Stansfield*, (1868) L. R. 3 Ex. 220.

(*b*) *Per* Bramwell, L.J., *Seaman* v. *Netherclift*, (1876) 2 C. P. D. p. 60.

(*c*) See below, p. 599.

(*d*) 1 Will. & Mar. sess. 2, c. 2; *Ex parte Wason*, (1869) L. R. 4 Q. B. 573.

(*e*) *Goffin* v. *Donnelly*, (1880) 6 Q. B. D. 307; *per cur.*, *Kane* v. *Mulvaney*, (1866) Ir. Rep. 2 C. L. p. 415.

(*f*) *Lake* v. *King*, (1668) 1 Wm. Saund. 120: see *Stockdale* v. *Hansard*, (1839) 9 A. & E. 1; as to petitions, see below, p. 595.

(*g*) *Rex* v. *Creevy*, (1813) 1 M. & S. 273; *Stockdale* v. *Hansard*, *supra*.

defendant who is sued for the publication of any papers by the direction of either House, or of any copies of such papers, may produce a certificate of his authority, verified by affidavit, to the Court in which the action is proceeding, and thereupon the action shall be stayed (*a*).

Official communications.

3. It must frequently be the duty of public servants, both civil and military, to publish matter of a defamatory nature, especially in the confidential reports which in the ordinary course of affairs it is necessary to furnish to the heads of departments and other superior officers. The privilege attaching to such communications is absolute. It has been held that an official report on one of his subordinates, furnished by a general to the Horse Guards, is privileged, though made maliciously and without reasonable and probable cause (*b*), and this on two grounds, one applying only to military and naval affairs, the other to the public service generally. It was said (*c*) that no one serving in His Majesty's forces can in respect of any matter of discipline or question affecting his military *status* appeal to any other jurisdiction than that which is created by the Mutiny Acts and the articles of war to which he has voluntarily submitted himself (*d*). It was also said to be a matter of public policy that all servants of the Crown should make their official communications without any possible fear of consequences before them, and that, therefore, their privilege was absolute (*e*). On this latter principle it has been held that a communication made by a Secretary of State to his Parliamentary Under Secretary in the course of his official duty cannot be made the subject of an action for libel (*f*).

Privilege against production.

Moreover, all writers of confidential official communications are protected by a privilege of a different kind, which does not indeed in terms cover their liability, but makes it practically impossible to prove a case against them. The production of

(*a*) See *Stockdale* v. *Hansard*, (1839) 11 A. & E. 297.

(*b*) *Dawkins* v. *Lord Paulet*, (1869) L. R. 5 Q. B. 94.

(*c*) *Per* Mellor & Lush, JJ.

(*d*) See too *Sutton* v. *Johnstone*, (1786–7) 1 T. R. 493; *In re Mansergh*, (1861) 1 B. & S. 400.

(*e*) *Per* Mellor J., (1869) L. R. 5 Q. B. p. 115.

(*f*) *Chatterton* v. *Secretary of State for India*, (1895) 2 Q. B. 189. Though other judges have taken a different view: see *Beatson* v. *Skene*, (1860) 5 H. & N. 838; see too *Hart* v. *Gumpach*, (1872) L. R. 4 C. P. 439; *Grant* v. *Secretary of State for India*, (1877) 2 C. P. D. 445.

such documents will not be permitted in courts of justice, both because state secrets may be thereby disclosed, and because it is desirable that public servants should be able to write freely on matters affecting the public service without exposing themselves to the fear of actions. It is sufficient if the official who has the supreme control of the documents object to their production on the ground of public interest (*a*), but even without such objection the Court in fitting cases will act on its own responsibility (*b*).

Qualified privilege.

The definition of "qualified privilege" may be best given in the words of a well-known judgment: "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (*c*). There are three elements necessary to make the defence of qualified privilege good. The occasion must be fit, the matter must have reference to the occasion, and it must be published from right and honest motives.

Distinguished from absolute privilege.

Thus there are two differences between privilege qualified and privilege absolute. In the case of the latter it is the occasion which is privileged, and when once the nature of the occasion is shown, it follows, as a necessary inference, that every communication on that occasion is protected. But in the case of the former the

(*a*) *Beatson* v. *Skene*, (1860) *supra*, p. 579; Martin, B., diss.

(*b*) *Hennessy* v. *Wright*, (1888) 21 Q. B. D. 509; see too *Home* v. *Bentinck*, (1820) 2 B. & B. 130; *Chatterton* v. *Secretary of State for India in Council*, (1895) 2 Q. B. p. 195.

(*c*) *Per Cur.*, *Tvogood* v. *Spyring*, (1834) 1 C. M. & R. p. 193; see *per* Lindley, L.J., *Stuart* v. *Bell*, (1891) 2 Q. B. p. 345.

defendant does not prove privilege until he has shown how the occasion was used. A communication on a privileged occasion, therefore, is not necessarily a privileged communication, though the terms are frequently used as convertible. "It is not enough to have an interest or duty in making *a* communication, the interest or duty must be shown to exist in making *the* communication complained of" (*a*). Secondly, even after a case of qualified privilege has been established, it may be met by the plaintiff proving in reply actual malice on the part of the defendant, for he thus shows that the plea is only colourable, and that under the pretence of doing his duty or protecting his lawful interest the defendant has been pursuing some by-end or gratifying his ill-will.

Functions of judge and jury.

The great difficulty in cases of qualified privilege is to disentangle the respective duties of judge and jury. Formerly a usual course was for the judge, if the circumstances raised a suggestion of privilege, to ask the jury whether the defendant had been acting *bonâ fide* in the exercise of his privilege, and also whether his motives had been malicious (*b*). The practical effect was that a defendant had to satisfy the jury in every case that he had acted prudently and properly as well as honestly. It seems to have been felt that this course was attended with inconvenience, and operated unduly to the prejudice of defendants, and accordingly a larger share of authority was taken into the judge's hands. In *Somerville* v. *Hawkins* (*c*) the defendant had discharged the plaintiff from his service. Subsequently the latter called to receive his wages, and the defendant then called in two other servants as witnesses, stated that he had dismissed the plaintiff for robbing him, and warned them against having anything to say to him in future. The plaintiff was nonsuited, and the non-suit was held to be correct, on the ground that the defendant had a duty and interest in making the communication in question, which was therefore *primâ facie* privileged, that his good faith could not be called in question without

Alteration of law by *Somerville* v. *Hawkins*.

(*a*) *Per* Dowse, B., *Lynam* v. *Gowing*, (1880) 6 L. R. Ir. pp. 268–9.

(*b*) *Blackburn* v. *Blackburn*, (1827) 4 Bing. 395; *Bromage* v. *Prosser*, (1825) 4 B. & C. 247; *Pattison* v. *Jones*, (1828) 8 B. & C. 578. 3 & 4 Vict. c. 9, s. 3, shows what the general rule was understood to be at the time of its enactment.

(*c*) (1851) 10 C. B. 583.

some evidence of express malice, and that consequently, in the absence of such evidence, there was nothing to leave to the jury.

Judge to decide whether communication privileged.

This case, the principle of which has been accepted and followed in a long chain of authorities (*a*), altered the law (*b*), and it has since then almost invariably been held that the question of privilege and the question of malice are entirely distinct; that the former is in the first place to be decided by the judge on the assumption of good faith on the part of the defendant, and that the latter only is for the jury, and to be proved affirmatively by the plaintiff. The judge, therefore, has not only to rule whether the occasion was privileged, but whether the communication in question had reference to the occasion. With any actual conflict of testimony the jury must of course deal, but, for the rest, the judge has to draw inferences both of law and fact, just as he does in the analogous case of reasonable and probable cause in actions of malicious prosecution. The rule here suggested, however, is one which though practically acted on has never been in terms authoritatively propounded, and it must be said to be still a doubtful matter how far a judge is bound to invite the assistance of the jury in deciding whether a communication is privileged or not. Where defamatory matter had been dispatched by telegram, and the privilege depended upon whether this method of communication was under the circumstances reasonable or not, the question of reasonableness was left at the trial to the jury (*c*).

Unreasonable use of privileged occasion only evidence of malice.

It would appear from recent decisions that when once it is ruled that the occasion is privileged and that the matter complained of has reference to the occasion, the only remaining question is whether the occasion was used without malice.

(*a*) *Taylor* v. *Hawkins*, (1851) 16 Q. B. 308; *Manby* v. *Witt*, (1856) 18 C. B. 544; *Harris* v. *Thompson*, (1853) 13 C. B. 333; *Amann* v. *Damm*, (1860) 8 C. B. N. S. 597; *Force* v. *Warren*, (1864) 15 C. B. N. S. 806; *Whitely* v. *Adams*, (1863) 15 C. B. N. S. 392; *Cook* v. *Wildes*, (1855) 5 E. & B. 328; *Laughton* v. *The Bishop of Sodor and Man*, (1872) L. R. 4 C. P. 495; *Henwood* v. *Harrison*, (1872) L. R. 7 C. P. 606; *Jenoure* v. *Delmege*, (1891) A. C. 73. The earlier case of *Gardner* v. *Slade*, (1849) 13 Q. B. 796, was decided on the same principle.

(*b*) *Per* Erle, J., *Cook* v. *Wildes*, (1855) 5 E. & B. 328, at p. 336.

(*c*) *Williamson* v. *Freer*, (1874) L. R. 9 C. P. 393. But probably the judge ought to have himself ruled that the communication was not privileged. See *per* Lord Esher, M.R., (1891) 1 Q. B. p. 478.

In the headnote of *Clark* v. *Molyneux* (*a*) it is said that statements made on a privileged occasion will be protected even though made without any reasonable ground, provided it does not appear that the defendant acted from any indirect motive. This note, however, is founded on certain *dicta* in the case, but not on the actual decision, which was not on the question of privilege at all, but on the question of malice (*b*). But the same principle appears to be affirmed in *Pittard* v. *Oliver* (*c*); and in *Neville* v. *Fine Arts and General Insurance Co.* (*d*) it was decided that where the statement complained of has reference to the privileged occasion and therefore comes within it, the only remaining issue is that of malice, and the only way in which any excess in the statement is material, is as being evidence of malice, of which however it is by no means conclusive. In the last-mentioned case the jury found that the defendants had exceeded the privileged occasion, and it was held that that fact did not entitle the plaintiff to succeed in the absence of a finding of express malice. Where, however, extraneous statements are published which can have no reference to the privileged occasion or the occasion has been wilfully misused (*e*), it is apprehended that it becomes the duty of the judge to rule that so far as they are concerned the occasion is not privileged. Where a defendant, having received a lawyer's letter written on behalf of the plaintiff, replied in terms of general abuse of the latter, it was held that there was no privilege at all (*f*). Mere exaggeration of language, however, though it may be evidence of malice, will not destroy privilege (*g*).

Degree of publicity.

With regard to the publicity given, it has been said that a

(*a*) (1877) 3 Q. B. D. 237.

(*b*) And see on this point, *Darby* v. *Ousely*, (1856) 1 H. & N. 1.

(*c*) (1891) 1 Q. B. 474.

(*d*) (1895) 2 Q. B. 156.

(*e*) *Neville* v. *Fine Arts, &c., supra*; *Hunt* v. *Great Northern R. Co.*, (1891) 2 Q. B. 189.

(*f*) *Huntley* v. *Ward*, (1859) 6 C. B. N. S. 514. See also *Warren* v. *Warren*, (1834) 1 C. M. & R. 250; *Godson* v. *Home*, (1819) 1 B. & B. 7.

(*g*) *Cook* v. *Wildes*, (1855) 5 E. & B. 328; *Cowles* v. *Pott*, (1865) 34 L. J. Q. B. 247, which seems to overrule *Tuson* v. *Evans*, (1840) 12 A. & E. 733; see also *per* Willes, J., *Huntley* v. *Ward*, *supra*. The contrary appears to have been held in *Fryer* v. *Kinnersley*, (1863) 15 C. B. N. S. 422, and in *Robertson* v. *McDougal*, (1828) 4 Bing. 670, in both of which cases it could hardly be said that the intemperate expressions used were irrevelant to the privileged occasion; but it is submitted that these cases are no longer law.

defendant will not lose his privilege because he goes somewhat beyond the strict necessities of the case. There is authority to show that where an occasion is otherwise privileged it will not lose its character by the fact of the casual presence of one (*a*), or even of several uninterested bystanders (*b*), and that such presence is material only on the question of malice. Some doubts arise as to the exact rule to be deduced from these cases. Of course, if a defendant has practically no opportunity of making his communication except in the presence of uninterested persons, it is just that his privilege should be unaffected. On this principle seems to have been decided the case of *Pittard* v. *Oliver* (*c*). The passage in *Toogood* v. *Spyring* (*d*), which says that the business of life must be carried on, impliedly asserts the same doctrine. In *Davies* v. *Snead*, however, no reasonable necessity seems to have existed. As already pointed out, when it has once been ruled that the occasion is privileged the privilege is not necessarily lost because the defendant used the occasion unreasonably, yet there must be a reasonable occasion or exigency (*e*) for the question of privilege to arise at all. There is no privilege if a man publishes a libel by postcard, or by a letter which he knows may be opened by the clerk of the addressee (*f*): but there seems little difference in principle between the case of a clerk or postman and that of a casual bystander. It seems clear that a clergyman may not publish in a pastoral letter matters which he would be privileged in mentioning by way of private advice and admonition to individual parishioners (*g*).

Solicitors.

Where a communication would be privileged if made by a client, it will also be privileged if made by his solicitor acting on his behalf (*h*). Indeed the privilege of the solicitor in such case seems to be even wider than that of his client, for the solicitor will not lose his privilege by reason of his publishing the communication to a type-writing or a copying clerk employed by him

(*a*) *Toogood* v. *Spyring*, (1834) 1 C. M. & R. 181.

(*b*) *Davies* v. *Snead*, (1870) L. R. 5 Q. B. 608.

(*c*) (1891) 1 Q. B. 474.

(*d*) See below, p. 612.

(*e*) *Toogood* v. *Spyring*, *supra*, at p. 194.

(*f*) *Pullman* v. *Hill*, (1891) 1 Q. B. 524; but see *Sadgrove* v. *Hole*, (1901) 2 K. B. 1, C. A.

(*g*) *Gilpin* v. *Fowler*, (1854) 9 Ex. 615.

(*h*) *Baker* v. *Carrick*, (1894) 1 Q. B. 838.

in the conduct of his correspondence (*a*), whereas a similar publication by the client to his clerks would not be privileged (*b*). The ground upon which this distinction has been rested, seems to be that if a solicitor has occasion in the course of his business to write a defamatory letter, it is necessary that he should employ clerks for the purpose, but that if a layman has occasion to write a similar letter it is not necessary for him to employ clerks for the purpose, even though he be a merchant, but he ought to write the letter himself. The distinction does not seem altogether satisfactory (*c*).

Mistake.

It was formerly supposed that persons who, in seeking redress had applied to the wrong quarter, were protected if their error was a natural and not unreasonable one (*d*), but in the modern case of *Hebditch* v. *McIlwaine* (*e*), the authorities upon which this doctrine was based were explained away.

Charges against more than one person.

It has also been decided that, where there is an imputation against two persons jointly, so that the misconduct charged against one cannot well be explained without introducing the name of the other, if circumstances exist which make the communication privileged as regards one person it will be privileged as regards both. Thus, where the defendant discharged the plaintiff, who was his footman, and also discharged at the same time his cook, and gave to the latter as his reason for so doing that she and the footman had been robbing him, it was held that the statement was privileged as against both (*f*).

Grounds of privilege.

A privileged communication may be made in the discharge of a duty, or in the pursuance of a right, or for both reasons. It may be in the interest of the person to whom it is addressed, or in the interest of the person making it, or in their common interest, or finally in the public interest (*g*). Under which of these heads

(*a*) *Boxsius* v. *Goblet Frères*, (1894) 1 Q. B. 842.

(*b*) *Pullman* v. *Hill*, (1891) 1 Q. B. 524.

(*c*) It has been held the issue by a joint-stock company of a printed circular containing defamatory matter to their shareholders was privileged, notwithstanding that it involved a publication to the printers: *Lawless* v. *Anglo-Egyptian Cotton Co.*, (1869) L. R. 4 Q. B. 262.

(*d*) *Fairman* v. *Ives*, (1822) 5 B. & Ald. 642; *Harrison* v. *Bush*, (1855) 5 E. & B. 344.

(*e*) (1894) 2 Q. B. 54.

(*f*) *Manby* v. *Witt*, (1856) 18 C. B. 544; see *Davies* v. *Snead*, (1870) L. R. 5 Q. B. 608.

(*g*) Communications made in the public interest ought not perhaps to be called privileged, since to make them is

a particular case may fall it is not always easy to determine; indeed, privilege may frequently be put upon more than one ground. A few illustrations are here given without any pretence to an exhaustively accurate classification.

It is to be observed that privilege depends not upon the notion in the defendant's own mind as to his right or duty, but upon the view which the Court takes of what his right or duty in fact was under the circumstances as known to him (*a*).

Interest of person to whom communication made.

1. The commonest form of privileged communication is that which is made in the interest of the person to whom it is addressed. "Where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts" (*b*), he is privileged in so doing. The facts must be important for the person in question to know; they must be for the guidance and regulation of his conduct (*c*). If the communication cannot influence conduct there is no privilege. Thus, where the agent of one side in a contested election wrote to the opposing agent, after the close of the poll, accusing a certain voter of bribery, it was held that as the recipient of the letter had no jurisdiction to punish or to inquire into the alleged bribery, and was not invested with authority to institute proceedings in respect of it, and as any duty he might have had with reference to the election was entirely over at the time it reached him, he had no interest or authority in the matter, and there was no legal excuse for the publication (*d*).

The privilege will depend partly upon the nature of the communication, partly upon the relation in which the parties stand to one another. A defendant may protect himself by showing either that he was in a position of confidence or intimacy with the person to whom he published the matter complained of, or

a general and not a special right. See *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275. The distinction, however, is verbal rather than substantial.

(*a*) "The question is, what *is* the defendant's duty; not what he *thinks* to be his duty:" *per* Byles, J., *Whitely* v. *Adams*, (1863) 15 C. B. N. S. p. 412. And see *Hebditch* v. *McIlwaine*, (1894) 2 Q. B. 54; *Stuart* v. *Bell*, (1891) 2 Q. B. 341.

(*b*) *Per* Blackburn, J., *Davies* v. *Snead* (1870) L. R. 5 Q. B. p. 611; see *per* Lindley, L.J., *Stuart* v. *Bell*, (1891) 2 Q. B. p. 351; *Hunt* v. *Great Northern R. Co.*, (1891) 2 Q. B. 189.

(*c*) See *Bromage* v. *Prosser*, (1825) 4 B. & C. 247.

(*d*) *Dickeson* v. *Hilliard*, (1874) L. R. 9 Ex. 79.

that he acted in consequence of a request for information lawfully made, or that although a mere volunteer he had such special means of knowledge as imposed a special obligation upon him.

Positive duty

(a.) There are, of course, certain cases in which it is a duty not of imperfect but of clear and peremptory obligation for one man to disclose all he knows to another. A servant or agent is bound to lay before his employer all the information which he possesses with regard to the interests entrusted to his care (*a*). So, where two or more people are jointly intrusted with the protection of any interest, or the conduct of any investigation, it is clearly proper that the confidential communication between them of all matters affecting the discharge of their duty should be free and unrestrained (*b*). However, the doctrine of privilege arising out of confidential relationship has been extended very widely beyond the ground of positive duty, and whenever one man stands on such a footing with another that he may reasonably and properly take upon himself to tender advice or information, he will be privileged in so doing. Thus, a master may warn his servants against the character of an associate (*c*). But apparently the officials of a trades union may not communicate to its members or others information which they know will result in a breach of the contractual rights of third parties (*d*). A near relation may give a lady his opinion of her suitor (*e*). A solicitor may give warning to a client of any peril to his interests, though not professionally consulted (*f*). The relationship of host and guest imposes upon the former a social and moral duty to inform the latter of suspicions which have fallen upon his servant (*g*). A member of Parliament may publicly give political advice and

Confidential relationship

(*a*) *Lawless* v. *Anglo-Egyptian Cotton* Co., (1869) L. R. 4 Q. B. 262 ; *Cook* v. *Wildes*, (1855) 5 E. & B. 328.

(*b*) *Beatson* v. *Skene*, (1860) 5 H. & N. 838 ; *Hopwood* v. *Thorn*, (1849) 8 C. B. 293 ; *Harris* v. *Thompson*, (1853) 13 C. B. 333.

(*c*) *Somerville* v. *Hawkins*, (1851) 10 C. B. 583 ; *Hunt* v. *Great Northern R. Co.*, (1891) 2 Q. B. 188.

(*d*) *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, (1903) 2 K. B. 545, C. A. ; affirmed *sub nom.* *South Wales Miners' Federation* v *Glamorgan Coal Co.*, (1905) A. C. 239 H. L. ; *Read* v. *Friendly Society of Stone Masons*, (1902) 2 K. B. 732, C. A.

(*e*) *Todd* v. *Hawkins*, (1837) 8 C. & P. 88.

(*f*) *Davies* v. *Reeves*, (1855) 5 Ir. C. L. R. 79.

(*g*) *Stuart* v. *Bell*, (1891) 2 Q. B. p. 359, *per* Kay, L.J.

information to his constituents, and a bishop ecclesiastical advice and information to his clergy, and if in so doing they publish defamatory matter, it will be *primâ facie* privileged (*a*). A parochial clergyman, it would seem, is not, under ordinary circumstances, privileged in publishing to his parishioners at large matters defamatory of any individual, although the imputations are such as it might be his duty to convey in the course of private admonition (*b*). It has been held that a clergyman is privileged in conveying to the incumbent of a neighbouring parish imputations on the character of a person invited by the latter to occupy his pulpit (*c*), and that a parishioner is privileged in informing his clergyman of slanders current with regard to the latter (*d*). Where persons have once been brought into confidential relationship on a certain subject-matter, subsequent communications on the same topic are privileged. Thus, an employer who has given another a character of a servant may afterwards correct and qualify his previous statements (*e*), and a person who has received a servant with a character, which he finds to be undeserved, is privileged in communicating his opinion to the former employer (*f*).

Information in answer to inquiry.

(b.) Any answer to a question which appears to be put for the guidance of the questioner's conduct in a matter of practical importance, is privileged. Thus, if one trader makes inquiries of another with regard to the solvency of persons with whom he proposes to have dealings, the latter is protected in communicating any information which he possesses (*g*). Where inquiries are being made with a view to the detection of a criminal offence, any answer honestly given affords no ground for action, though it involve a direct charge of felony (*h*). Of this principle the most familiar example is afforded by the protection which is

(*a*) *Per Cur.*, *Wason* v. *Walter*, (1868) L. R. 4 Q. B. p. 95; *Laughton* v. *The Bishop of Sodor and Man*, (1872) L. R. 4 P. C. 495. And see *Barratt* v. *Kearns*, (1905) 1 K. B. 504, C. A.

(*b*) *Gilpin* v. *Fowler*, (1854) 9 Ex. 615; *Magrath* v. *Finn*, (1877) Ir. R. 11 C. L. 152.

(*c*) *Clark* v. *Molyneux*, (1877) 3 Q. B. D. 237, C. A.

(*d*) *Davies* v. *Snead*, (1870) L. R. 5 Q. B. 608.

(*e*) See *Gardner* v. *Slade*, (1849) 13 Q. B. 796.

(*f*) See *Child* v. *Affleck*, (1829) 9 B. & C. 403; *Wilson* v. *Robinson*, (1845) 7 Q. B. 68. This, however, is doubted in *Fryer* v. *Kinnersley*, (1863); see *per* Erle, C.J., 15 C. B. N. S. p. 429.

(*g*) See *Robshaw* v. *Smith*, (1878) 38 L. T. N. S. 423.

(*h*) *Kine* v. *Sewell*, (1838) 3 M. & W. 297.

accorded to masters in giving characters of servants, although the privilege in this case has been put on the ground of the servant's implied assent (*a*). The mere fact, however, that a man is asked a question does not necessarily give him privilege. He ought to be reasonably satisfied that his questioner has some interest or duty in the matter. "It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions" (*b*). If a question is first invited and then answered by a defamatory statement, such statement is to be considered as purely voluntary (*c*). So, if the defendant has without lawful occasion impugned the plaintiff's character, and then, on being challenged, reaffirms what he stated before, he will not be privileged in so doing. It is otherwise, however, if the first statement is privileged. The original publication and its repetition and vindication stand on the same footing (*d*),

Inquiry must be reasonable on the face of it.

(c.) Volunteered communications were formerly regarded with much less liberality than they are at the present day. It has sometimes been suggested that an uninvited communication not made in pursuance of any special duty, though it may be privileged, carries with it some evidence of malice, and that it is for the defendant in such a case to satisfy the jury of his good faith (*e*). Other opinions went so far as to deny all privilege to volunteered communications made by an entire stranger.

Volunteered communications.

In *Coxhead* v. *Richards* (*f*) the plaintiff was in command of a merchant vessel. The defendant received from the mate of that vessel, who was his friend, a letter imputing drunkenness and

(*a*) It is suggested by Lord Alvanley, C.J. (*Rogers* v. *Clifton*, (1803) 3 B. & P. p. 592), that if a servant knowing that he will get a bad character, writes an application to his former master, no action lies in respect of anything that may be published in consequence, because the master has been entrapped. It was held, however, in *Duke of Brunswick* v. *Harmer*, (1850) 14 Q. B. 185, that a plaintiff might sue in respect of a publication which he himself had procured.

(*b*) *Per* Erle, C.J., *Force* v. *Warren*, (1864) 15 C. B. N. S. p. 808.

(*c*) *Gardner* v. *Slade*, (1849) 13 Q. B. 796.

(*d*) *Griffiths* v. *Lewis*, (1845) 7 Q. B. 61; *Taylor* v. *Hawkins*, (1851) 16 Q. B. 308.

(*e*) *Pattison* v. *Jones*, (1828) 8 B. & C. 578. It must be remembered, however, that at the date of this decision, it was customary in all cases to leave the question of good faith to the jury, It is overruled in *Gardner* v. *Slade*, *supra*, where it is pointed out that if an occasion is privileged at all the mere use of it cannot be evidence of malice.

(*f*) (1846) 2 C. B. 569.

other grave charges against his captain, and asking for advice. The defendant, after consideration and consulting with experienced persons, placed the letter in the hands of the owners, who consequently ceased to employ the plaintiff. The Court was equally divided as to whether the communication was privileged. Two judges (*a*) held it to be so on the ground that, information of a most important character having come into the defendant's possession, it was his duty to disclose it to those whose interests were concerned. The other two (*b*) denied the privilege, on the ground that the defendant was an entire stranger to all the parties, and that if he were held excused it would give licence to all the world to go tale-bearing. A like division of opinion was found among the same judges in a case decided about the same time, in which the defendant had volunteered an imputation on the plaintiff's solvency to a person intending to give the latter credit (*c*). The more liberal view, however, appears now to be established (*d*). Volunteered communications are not now considered to stand on any special footing, and the officiousness of the intervention is merely one matter to be considered among others. A servant or a friend may properly convey information or give advice, which would be impertinent on the part of a stranger. The latter is only entitled to interfere when he has some special means of information on a matter of practical importance. Thus, where the defendant had reason to believe himself robbed by the plaintiff, Willes, J., considered that he was discharging a social duty in giving information to the plaintiff's employer (*e*). In *Stuart* v. *Bell* (*f*) the plaintiff was a valet, and he and his master were staying with the defendant, who was a magistrate and mayor of Newcastle. The chief constable of Newcastle showed the defendant a letter which he had received

Communication volunteered by stranger should be based on special knowledge.

(*a*) Tindal, C.J., and Erle, J.

(*b*) Coltman and Cresswell, JJ.

(*c*) *Bennett* v. *Deacon*, (1846) 2 C. B. 628.

(*d*) See *per* Willes, J., *Amann* v. *Damm*, (1860) 8 C. B. N. S. p. 602; *per* Blackburn, J., *Davies* v. *Snead*, (1870) L. R. 5 Q. B. p. 611; *per* Lindley, L.J., *Stuart* v. *Bell*, (1891) 2 Q. B. p. 347.

(*e*) *Amann* v. *Damm*, (1860) 8 C. B. N. S. p. 601.

(*f*) (1891) 2 Q. B. 341. The judgments, however, do not proceed solely upon the ground that the defendant was a volunteer, but also, and in the case of Kay, L.J., principally, on the ground of the relationship of host and guest which existed between the defendant and the plaintiff's master.

from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft; it was held that the communication of that fact by the defendant to the plaintiff's master was upon a privileged occasion. But it cannot be of importance to anybody to have general gossip repeated to him, or to learn the opinions of people with whom he has no concern. Thus in *Botterill* v. *Whytehead* (*a*) the defendant, a clergyman, wrote to a committee engaged in restoring a church, strongly protesting against the employment of the plaintiffs as architects, and imputing to them ignorance and incompetence, and the communication was held unprivileged.

Common interest.

2. Communications between parties who are alike concerned in the condition of some property, or the management of some undertaking, are privileged on the ground of their common interest.

Thus, it is privileged for a tenant to complain to his landlord of the misconduct of a person employed by the latter to repair the tenant's premises (*b*). It is privileged for a landlord to complain to the tenant of such conduct on the part of the tenant's lodgers as may injure the reputation of the house (*c*). Where the defendant had repudiated liability for goods supplied to an order purporting to come from him, and on being shown the order expressed the belief that it was in the plaintiff's handwriting, it was held that this statement was privileged, insomuch as it was directed to the investigation of a matter in which the defendant and the person supplying the goods were alike interested (*d*).

Interest must be direct.

The character and capacity of a servant is no doubt a matter of common interest to all whom he serves. It is not, however, a privileged topic for discussion for those who have no direct responsibility in the matter. The mere fact that two people are both subscribers to a society, or both shareholders in a company, does not privilege them in communicating to one another defamatory matter with respect to their officials (*e*). In ordinary

(*a*) (1879) 41 L. T N. S. 588.

(*b*) *Toogood* v. *Spyring*, (1834) 1 C. M. & R. 181.

(*c*) See *Knight* v. *Gibbs*, (1834) 1 A. & E. 43.

(*d*) *Croft* v. *Stevens*, (1862) 7 H. & N. 570.

(*e*) *Brooks* v. *Blanshard*, (1833) 1 C. & M. 779; *Martin* v. *Strong*, (1836) 5 A. & E. 535; with which cases cp.

cases all complaints should be made to the directors, or committee, or other persons to whom the management of affairs is delegated. The intervention of the general body is confined to special occasions, and communications on such occasions are no doubt privileged if pertinent to the business in hand. The mass of members of societies and corporations usually meet for election purposes, and they are obviously entitled on such occasions to freely interchange information as to the qualifications of the candidates before them (*a*). So, it would seem clear that everything passing at the meetings of boards of guardians, town councils, and other local governing bodies is privileged if relevant and honestly made for the purpose of enabling, by means of free discussion, those present to better discharge their common duty.

In *Andrews* v. *Nott Bower* (*b*) the magistrates for a borough had ordered the head constable of the borough to prepare, for the purpose of facilitating the business of the general annual licensing meeting, a report stating the grounds of objections taken to the renewal of licences, and to issue copies to persons having business before the meeting, and it was held that the publication of the report in pursuance of the orders of the magistrates was upon a privileged occasion.

Interest of person making the communication.

3. The third class of communications to which a qualified privilege attaches, are those which a man makes in his own interest, in defence either of his property or his character. Where the defendant, having sold goods to the plaintiff on credit, subsequently learnt that the latter had sold off his stock and was not to be found, and, thereupon, gave notice to the auctioneer in whose hands were the proceeds of the plaintiff's sale not to pay them over to him, on the ground that he had committed an act of bankruptcy, the communication was held privileged (*c*).

So, where a creditor of a half-pay officer in the army wrote to the Secretary at War complaining that his debtor was deliberately

Harris v. *Thompson*, (1853) 13 C. B. 333.

(*a*) See *Brooks* v. *Blanshard*, *supra*, p. 591; *Kershaw* v. *Bailey*, (1848) 1 Ex. 743.

(*b*) (1895) 1 Q. B. 888.

(*c*) *Blackham* v. *Pugh*, (1846) 2 C. B. 611; approved in *Baker* v. *Carrick*, (1894) 1 Q. B. 838.

avoiding the discharge of his liability, and petitioning (*a*) the secretary to compel payment, it was held that this also was a case of privilege, insomuch as the letter was written "not for the purpose of slandering, but for the purpose of obtaining redress for an injury, and made to a public officer who had the means of giving such redress" (*b*).

Where the defendant, having discharged the plaintiff from his service, warned his other servants against associating with him because he had been guilty of theft, one of the grounds on which the communication was held privileged was that the defendant had an interest in preventing his servants having anything to do with a man whom he believed to be dishonest (*c*). So, where the plaintiff, having been sent on an errand to the defendant's office, was believed by him to have taken the opportunity to steal a box, and the defendant thereupon made complaint to the plaintiff's master, it was held that the defendant had a right to secure himself against the visits of a person whom he believed to have robbed him, and for this reason, among others, the plea of privilege was successful (*d*). As, however, it has been held that imputations, false in fact and incapable of justification, although made honestly, are malicious in law, it is apparently a matter to be deduced from the facts in each particular case, whether the legal malice, arising out of the false imputation, does not avoid the privilege (*e*).

Self-justification.

It is reasonable, and therefore privileged, that a man should explain his motives and conduct to those who have been brought into confidential relations with him in respect of the subject-matter of the communication. The case of *Whitely* v. *Adams* (*f*) furnishes the most remarkable illustration of privilege of this description. The defendant was a clergyman, and litigation had arisen between a member of his congregation and the plaintiff. He was invited by one of the clergy of the plaintiff's parish to

(*a*) As to petitions, see below, pp. 595–6.

(*b*) *Per* Holroyd, J., *Fairman* v. *Ives*, (1822) 5 B. & Ald. p. 646. See, too, *Tuson* v. *Evans*, (1840) 12 A. & E. 733; *Huntley* v. *Ward*, (1859) 6 C. B. N. S. 514.

(*c*) *Somerville* v. *Hawkins*, (1851) 10 C. B. 583. See *Hunt* v. *Great Northern R. Co.*, (1891) 2 Q. B. 189.

(*d*) *Amann* v. *Damm*, (1860) 8 C. B. N. S. 597.

(*e*) *Darby* v. *Ouseley*, (1856) 1 H. & N. 1.

(*f*) (1863) 15 C. B. N. S. 392.

arbitrate in the dispute. He declined to do so, and in giving his reasons published matter defamatory of the plaintiff. An action was commenced, and a lady, the common friend of both parties, endeavoured to intercede between them and compose their differences. In communicating with her the defendant repeated his defamatory assertions, and thereupon, a second action was brought. It was decided in both cases that the action must fail, because the defendant had a right to explain to both his correspondents the motives of his conduct, and the grounds of belief upon which he proceeded (*a*).

Retorting on assailant.

If a man's character is attacked, he is not merely entitled to vindicate himself, but may retort upon his assailant any charges which may impair the latter's credit in that particular matter which is in controversy (*b*). But he is not entitled to indulge in mere recrimination, or to put forth one piece of defamation in revenge for another of an altogether different nature. The reply must be fairly relevant to the attack, and must not go beyond it in extent and character of publication (*c*).

Vindication at expense of another.

It may sometimes be the case that a charge can only be repelled by shifting the blame on to the shoulders of some one else. Where the defendant, a tradesman, wrote to a customer who had complained of being charged with the price of goods not delivered, and laid the blame on the dishonesty of the plaintiff, who was a servant of the customer, the vindication was held to be privileged (*d*). It would seem rather hard that a man, in order to protect his own character, should be allowed to hazard the character of another, possibly as innocent as himself. It has, however, been held in other cases that privilege is not lost by introducing the names of any persons which are reasonably required to make the communication clear and complete (*e*).

Public interest.

4. It is lawful in the public interest (*f*) to make charges and

(*a*) See too *Laughton* v. *The Bishop of Sodor and Man*, (1872) L. R. 4 C. P. 495.

(*b*) *Laughton* v. *The Bishop of Sodor and Man*, (1872) *supra*; *O'Donoghue* v. *Hussey*, (1871) Ir. Rep. 5 C. L. 124; *Dwyer* v. *Esmonde*, (1878) 2 L. R. Ir. 243.

(*c*) *Senior* v. *Medland*, (1855) 4 Jur. N. S. 1039; *Murphy* v. *Halwin*, (1874) Ir. Rep. 8 C. L. 127.

(*d*) *Coward* v. *Wellington*, (1835) 7 C. & P. 531.

(*e*) Seeabove, p. 585.

(*f*) Perhaps this may be said to be rather a general right than a privilege.

complaints against all public officials, but such communications ought to be addressed only to those who have power to punish the offender or otherwise to redress the grievance. Unproved personal imputations of a sordid and disgraceful character are of course not privileged, whether made with regard to public officials or private persons (*a*). This right to make specific accusations to particular persons must not be confounded with the general right of the public to discuss and comment on public matters. Therefore charges of misconduct against a poor-law official are not to be sown broad-cast through the press, though they may properly be laid before the Local Government Board (*b*). In *Harrison* v. *Bush* (*c*), it was held privileged to prefer a charge of misconduct against a magistrate to the Home Secretary, although the matter lay more immediately within the province of the Chancellor.

Privilege of petition.

As has been already seen, the publication of a petition in Parliament is absolutely privileged (*d*), provided that such publication takes place in the due order and course of Parliamentary proceedings. There is also of necessity a publication involved in preparing petitions and procuring signatures (*e*). The nature of the privilege attaching to such publication appears to be undetermined. It has been stated that the privilege is only qualified, but this may be doubted (*f*). A petition to the Crown in its legislative capacity would appear to stand on the same footing as a petition to one of the Houses of Parliament. In an old case it is said that the "exhibiting of the bill to the Queen is not of itself any cause of action, for the Queen is the head and fountain of justice, and therefore it is lawful for her subjects to resort to her to make their complaints. But if a subject, after the bill once exhibited, will divulge the matter comprised in it to the disgrace and discredit of the person intended, the same is a good cause of action" (*g*). It has been explained, however, that

See *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275.

(*a*) *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(*b*) *Purcell* v. *Sowler*, (1877) 2 C. P. D. 215.

(*c*) (1885) 5 E. & B. 344.

(*d*) See above, p. 578.

(*e*) There is no right to make defamatory statements at a meeting assembled to petition Parliament; *Hearne* v. *Stowell*, (1840) 12 A. & E. 719.

(*f*) *Per* Best, J., *Fairman* v. *Ives*, (1822) 5 B. & Ald. p. 648.

(*g*) *Hare & Meller's Case*, (1586) 3 Leo. p. 163.

this judgment had reference to the Crown only in its judicial capacity (*a*). When a petition is addressed to the executive the privilege is only qualified (*b*).

Parliamentary papers.

In order to protect individuals in the reasonable use, for the purposes of discussion and information, of extracts and abstracts of papers published by Parliamentary authority, it is enacted by 3 & 4 Vict. c. 9, s. 3, that it shall be lawful "to give in evidence under the general issue such report, paper, note, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice, and if such shall be the opinion of the jury, a verdict of not guilty shall be entered." It is to be observed that, in cases falling under this enactment, the judge is bound to deal with the issue of privilege in the manner customary before the decision in *Somerville* v. *Hawkins* (*c*), and cannot withdraw the case from the jury even though there be no evidence of express malice.

Comment and reporting.

Fair comment and criticism on matters which have become public property, and fair reporting of certain public proceedings, are protected, even although involving imputations on the characters of individuals. The principles upon which this protection rests have been a matter of some controversy (*d*).

Conflict of authority.

In *Henwood* v. *Harrison* (*e*), the defendants had commented with great severity on certain plans submitted to the Admiralty by the plaintiff, and thrown reflections on his capacity, and it was held that the defendant had a right of comment, the matter being one of national importance, that he had not exceeded his right, and that consequently, no evidence of actual malice being given, there was no case to submit to the jury. This decision, therefore, treated comment on the footing of ordinary privilege, leaving it to the judge to decide not merely as to the occasion, but as to the fitting use of the occasion.

In *Campbell* v. *Spottiswoode* (*f*) it was left to the jury to say whether a review published in the defendant's newspaper of the

(*a*) *Per* Pollock, B., *Webster* v. *Proctor*, (1885) 16 Q. B. D. 113.

(*b*) *Fairman* v. *Ives*, (1822) 5 B. & Ald. 642; *Webster* v. *Proctor*, (1855) 16 Q. B. D. 112.

(*c*) (1851) 10 C. B. 583. See above, p. 581.

(*d*) For recent cases on "fair comment," see *Hewson* v. *Cleeve*, (1904) 2 Ir. R. 536, C. A.; *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(*e*) (1872) L. R. 7 C. P. 606.

(*f*) (1863) 3 B. & S. 769.

plaintiff's book was within the limits of fair criticism, and also whether it had been written in good faith. The first question they answered in the negative, and the second in the affirmative, and it was held that these findings amounted to a verdict for the plaintiff. In other words, comment intrinsically unfair is not protected merely because it is not inspired by any malicious motive.

Fairness of comment or report question for jury.

It is to be observed that both these cases agree in requiring that the comment should be both fair in itself and inspired by no dishonest motive; the substantial difference is that in the one the question of fairness is treated as being for the judge, in the other as being for the jury. The latter view must be considered as the one now accepted (*a*).

The law in respect to the right of comment is thus laid down, in terms which it is presumed apply equally to the right of reporting. "It is important to bear in mind that the question is not whether the publication is privileged but whether it is a libel. The word privilege (*b*) is often used loosely and in a popular sense when applied to matters which are not properly speaking privileged. But for the present purpose the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in anyone else. . . . If it could be shown that the editor or publisher of a newspaper stands in a privileged position it would be necessary to prove actual malice. . . . I take it to be certain that he has only the general right which belongs to the public to comment upon public matters. . . . In such cases everyone has a right to make fair and proper comment, and so long as it is within that limit it is no libel" (*c*).

Honesty as well as fairness requisite.

The words "fair comment" at the conclusion of this passage are somewhat ambiguous. Fair comment, properly speaking, is relevant comment, suggested although not necessarily justified by the subject matter (*d*). It might, therefore, be supposed that a

(*a*) *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275.

(*b*) As a matter of fact, the word privilege is almost invariably used in the cases dealing with the right of reporting and the right of comment.

(*c*) *Per* Blackburn, J., *Campbell* v. *Spottiswoode*, (1863) 3 B. & S. pp. 780–1; approved in *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275, *supra*. The words, "no libel," must, it is conceived, be taken as equivalent to "not actionable," not as equivalent to "not defamatory."

(*d*) *Per* Bowen, L.J., *Merivale* v.

comment fair in this sense would be absolutely protected. It is doubtful, however, whether this is the case, for if the comment, though on the face of it "fair," is proved to be written with a malicious intent and is defamatory, there is no true exercise of the right (*a*). In this respect there is a close analogy with qualified privilege (*b*). Very considerable latitude, however, is admissible in matters of public interest. It being "only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all" (*c*). In the old case of *Carr* v. *Hood* (*d*) cited with approval by the Court of Appeal in *McQuire* v. *Western Morning News* (*e*), Lord Ellenborough said, "We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous." . . . "Show me an attack on the moral character of the plaintiff, or any attack on his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

Province of judge and jury.

The general result of the various decisions on this point is that where protection is claimed for the publication of matter which is of a defamatory nature on the ground that it is a fair report or comment, it is for the judge in the first instance to decide whether, under the circumstances, any right of comment or

Carson, *supra*, at p. 283. See, as to the distinction between a "fair" report and a *bonâ fide* report, *per* Brett, M.R., *MacDougall* v. *Knight*, (1886) 17 Q. B. D. p. 640.

(*a*) See *Joynt* v. *Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A.

(*b*) "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think it would, and for this reason, that the comment would not then be really a criticism of the work." *Per* Brett, M.R., *Merivale* v. *Carson*, (1887) 20 Q. B. D. p. 281.

(*c*) *Merivale* v. *Carson*, *supra*, Bowen, L.J., at p. 283. This statement of the law was approved in *South Hetton Coal Co.* v. *North-Eastern News Association*, (1894) 1 Q. B. pp. 143, 145, *per* Lopes and Kay, L.JJ. In the analogous case of a report of proceedings in Court, malice on the part of the publisher has been held to justify a judgment against him, notwithstanding that the report was a fair one. *Stevens* v. *Sampson*, (1879) 5 Ex. D. 53. This decision would seem to support the view of Brett, M.R., rather than that of Bowen, L.J.

(*d*) Note to *Tabart* v. *Tipper*, (1808) 1 Camb. at p. 356.

(*e*) *McQuire* v. *Western Morning News*, (1903) 2 K. B. 100.

report exists, and whether the publication in question is capable of being regarded as the exercise of such a right (*a*). It is then for the jury to say whether the publication in itself is fair (*b*). The further question of malice may also arise if the plaintiff has given any evidence of it.

Reports.

The right of reporting extends to proceedings in Courts of Law, proceedings in Parliament, and proceedings of public meetings and bodies.

Of judicial proceedings.

1. The general right of reporting legal proceedings has long been recognised. This right is, however, subject to certain restrictions where, in preliminary criminal proceedings resulting in the committal of the accused for trial, the partial character of the report is such as is calculated to prejudice the prisoner on his trial, and consequently to impede the due administration of justice (*c*). Apart from this qualification it has been broadly laid down that "when you once establish that a court is a public court a fair *bonâ fide* report of all that passes there may be published" (*d*); and in one modern case (*e*) it was held that the publication of a fair and accurate report of proceedings in open Court before magistrates upon an *ex parte* application for the issue of a summons for perjury was protected.

The privilege, however, does not attach to reports of all judicial proceedings, but only to reports of such proceedings as take place in an open court, that is to say, in a court to which the public are in fact admitted (*f*). The reason of the privilege is that, those of the public who are unable to obtain admission, owing to the accommodation of the court being limited, have a right to know through the medium of reports all that took place in the hearing of those who obtained admission. Therefore a report of what took place in judges' chambers would not be privileged (*g*).

(*a*) *Green* v. *Chapman*, (1837) 4 Bing. N. C. 92; *Popham* v. *Pickburn*, (1862) 7 H. & N. 891; *Lewis* v. *Clement*, (1820) 3 B. & Ald. 702; in Exch. Ch., 3 B. & B. 297.

(*b*) *Campbell* v. *Spottiswoode*, (1863) 3 B. & S. 769; *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275.

(*c*) *Rex* v. *Parke*, (1903) 2 K. B. 432; *Rex* v. *Fleet*, (1818) 1 B. & Ald. 379; *Duncan* v. *Thwaites*, (1824) 3 B. & C. 556.

(*d*) *Per* Bramwell, B., *Ryalls* v. *Leader*, (1866) L. R. 1 Ex. p. 300. See *per Cur.*, *Wason* v. *Walter*, (1868) L. R. 4 Q. B. p. 94.

(*e*) *Kimber* v. *The Press Association*, (1893) 1 Q. B. 65.

(*f*) *Kimber* v. *The Press Association*, (1893) 1 Q. B. 65.

(*g*) In *Smith* v. *Scott*, (1847) 2 C. & K. 580, Coleridge, J., indeed directed a jury

The privilege extends to copies of the records of a court which are open to the public and relate to judicial proceedings (*a*).

Newspapers.

As regards newspapers it has been enacted that "a fair and accurate report in any newspaper (*b*) of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter" (*c*). If the words of this section be compared with those of the next, it will appear that the words "fair" and "accurate" are practically equivalent, that considerations of motive are excluded, and that, consequently, the report if correct will be absolutely privileged (*d*). The excepted cases of reports of proceedings held with closed doors, and reports of a blasphemous and indecent nature, correspond with the exceptions recognised by the common law (*e*).

What may be reported.

What is reported must be fairly a part of the proceeding. There is no right in anyone to report the unauthorised observations of a by-stander (*f*): nor even what a judge or magistrate says, unless in office. "As to magistrates, if while occupying the bench from which magisterial business is usually administered, they under pretence of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the Commission of the Peace, reports of what passes before them is as little privileged as if they were illiterate mechanics in an alehouse" (*g*). But, as already pointed out,

that they might find such a report to be privileged; but the question whether judges' chambers are an open Court was not discussed.

(*a*) *Searles* v. *Scarlett*, (1829) 2 Q. B. 56; *Williams* v. *Smith*, (1888) 22 Q. B. D. 134; *Annaly* v. *Trade Auxiliary Co.*, (1890) 26 L. R. Ir. 394.

(*b*) A newspaper is defined as "any paper containing public news, intelligence or occurrences, or any remarks or observations therein, printed for sale and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers;" 51 & 52 Vict. c. 64, s. 1; 44 & 45 Vict. c. 60, s. 1.

(*c*) 51 & 52 Vict. c. 64, s. 3. There is nothing in this section to protect the reporter in so far as he makes a publication by sending his manuscript. See *Stevens* v. *Sampson*, (1879) 5 Ex. D. 53.

(*d*) The use of these words is strictly correct, as newspapers are now given *special* rights.

(*e*) *Per Cur.*, *Lewis* v. *Levy*, (1858) E. B. & E. at p. 558; *Rex* v. *Carlile*, (1819) 3 B. & Ald. 167; *Steele* v. *Brannan*, (1872) L. R. 7 C. P. 261.

(*f*) *Lynam* v. *Gowing*, (1880) 6 L. R. Ir. 259.

(*g*) *Per Cur.*, *Lewis* v. *Levy*, (1858) E. B. & E. p. 554. See *Paris* v. *Levy*, (1860) 9 C. B. N. S. 342.

there is a wide distinction between cases where a magistrate acts without colour of jurisdiction and cases where, although it turns out ultimately that jurisdiction was wanting, it is necessary to inquire into the facts in order to see whether or not this is so. A report of such an inquiry is protected (*a*).

Reports to be regarded as a whole.

The general rule is that a report should be a fair account of proceedings as a whole. It must give with substantial accuracy the general effect of all that passed. Details may be omitted or summarised.

Where a report of a trial gave the opening speech of counsel for the plaintiff, and said that it was borne out by the evidence, then gave an abstract of the speech for the defence, and the judge's summing up in full, it was held to be a question for the jury whether it was fair or not (*b*).

Fragmentary reports.

It is lawful under certain circumstances to publish fragmentary reports. Thus, for instance, where a trial goes on from day to day there can be no doubt that the proceedings of each day may be published separately at the time (*c*), but this licence is only given to meet the necessities of the case. After the trial is over it is not lawful to pick out one particular portion of the proceedings and publish a report of it to the defamation of anyone, even though the report, as far as it goes, is accurate. In *Macdougall* v. *Knight & Son* (*d*), the defendants had published in a pamphlet a report of the observations made by a judge in deciding a case in which the plaintiff was a litigant. The observations reflected on the plaintiff's character. The jury found that the pamphlet was a fair, accurate, and honest report of the judgment. In both of the Courts below it was held that this finding entitled the defendants to succeed. In the House of Lords the decision was affirmed on other grounds, but doubts were suggested by Lord Halsbury and Lord Bramwell as to

(*a*) *Usill* v. *Hales*, (1878) 3 C. P. D. 319. In *Allbutt* v. *General Council of Medical Education*, (1889) 23 Q. B. D. 400, the publication of the minutes of the council, containing a report of their proceedings, comprising a statement that the name of the plaintiff, a medical practitioner, had been removed from the register on the ground of misconduct, was held to stand on the same footing as a report of judicial proceedings, and to be privileged accordingly.

(*b*) *Milissich* v. *Lloyds*, (1877) 46 L. J. C. P. 404; overruling *Flint* v. *Pike*, (1825) 4 B. & C. 473, and *Lewis* v. *Walter*, (1821) 4 B. & Ald. 605.

(*c*) *Per Cur.*, *Lewis* v. *Lery*, (1858) E. B. & E. p. 560.

(*d*) (1886) 17 Q. B. D. 636.

whether the judgment would be privileged unless the jury found that it contained an accurate account of all the evidence on which it was founded (*a*). But on the point coming again before the Court of Appeal, the judges discussed and approved of their previous decision (*b*).

If an ordinary individual were to publish a contemporaneous report of proceedings on one day which bore hardly against the character of an individual, and were to omit to publish the subsequent proceedings which served to clear his character, such conduct, although it might not altogether make the publication unprivileged, would afford strong evidence of malice. It may be, however, that a newspaper proprietor under such circumstances would be protected. The publication would appear to be absolutely privileged at the time, and such absolute privilege could not well be divested by matter subsequent (*c*).

Mixed comment and report.

As will be seen hereafter, it is not actionable to discuss what has occurred in a Court of Justice, but such discussion ought not to be mixed with the report. It is one thing to lay the evidence fairly before the reader, and then to invite him to draw certain conclusions from it, another to prejudice the mind and colour the whole report by a running commentary. If this is done the report becomes unfair, and therefore is not protected. Much less must the reporter import information of his own. "A paper may give a report of the proceedings of Courts of Justice properly condensed and fair, but it is not entitled, under pretence of giving a report, to add comments of its own, or to display facts not brought forward in the proceedings" (*d*). A strong example of the danger of introducing comment into the body of a report is afforded by the case of *Lewis* v. *Clement* (*e*). The libel sued on was headed "Shameful conduct of an attorney," and contained a report of certain proceedings on the discharge of an insolvent, in which very strong observations were made on the plaintiff, the attorney in question. The defendant pleaded that the supposed

(*a*) (1886–9) 14 App. Cas. 194.

(*b*) *Macdougall* v. *Knight*, (1890) 25 Q. B. D. 1.

(*c*) 51 & 52 Vict. c. 64, s. 3.

(*d*) *Per* Cockburn, C.J., *Risk Allah Bey* v. *Whitehurst*, (1868) 18 L. T. N. S. p. 618. See too *Stiles* v. *Nokes*, (1806) 7 East, 493; *per Cur.*, *Lewis* v. *Levy*, (1858) E. B. & E. p. 553; *Hibbins* v. *Lee*, (1864) 4 F. & F. 243; and see *Rex* v. *Parke*, *supra*, (1903) 2 K. B. 432.

(*e*) (1820) 3 B. & Ald. 702; in Exch. Ch., 3 B. & B. 297.

ibel was a true report of the proceedings, and the jury found the issue in his favour. But the plaintiff had judgment *non obstante veredicto*, because the heading contained an allegation against the plaintiff which was no part of the report.

Parliamentary reports.

2. The right to report Parliamentary debates stands upon the same footing as the right to report proceedings in Courts of Law. "It seems clear that the principles on which the publication of reports of proceedings of Courts of Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect complete. . . The analogy between the case of reports of proceedings of Courts of Justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach to the other" (*a*). One of the limitations laid down in the judgment is that fragmentary reports are not protected, except when published by persons standing in some special relation, as members towards their constituents.

Where strangers excluded.

It is further suggested in *Wason* v. *Walter* (*b*) that the right of reporting parliamentary debates would still be recognised by the Courts, even though it were forbidden by a resolution of either House, or though the debates were held in secret. In this case, however, the analogy between proceedings in Parliament and proceedings in Courts of Law fails. The public have a right to be present at the latter, except in certain special cases; they have no such right with regard to the former (*c*). Reports are only intended to give members of the public who are absent the same means of knowledge as are enjoyed by those who are present.

Reports of public meetings

3. The general current of decisions has been adverse to the notion that any protection is given to reports of ordinary public meetings. It has been held that he who publishes accounts of proceedings of local governing bodies does so at his peril (*d*). However, in *Davis* v. *Duncan* (*e*) it was held a good defence that the libel sued on was a description of certain proceedings at an

(*a*) *Per Cur.*, *Wason* v. *Walter*, (1868) L. R. 4 Q. B. pp. 93–4.

(*b*) (1868) L. R. 4 Q. B. p. 95.

(*c*) See *per* Mellish, L.J., *Purcell* v. *Sowler*, (1877) 2 C. P. D. pp. 220–1.

(*d*) *Davison* v. *Duncan* (1857) 7 E. & B. 229; *Popham* v. *Pickburn*, (1862) 7 H. & N. 891.

(*e*) (1874) L. R. 9 C. P. 396. A similar point is discussed but not decided in *Purcell* v. *Sowler*, (1877) 2 C. P. D. 215. See *Pierce* v. *Ellis* (1856) 6 Ir. C. L. R. 55.

election meeting, but it does not seem clear whether the publication in question was treated as a report or as a comment on a matter of public interest. As regards newspapers, however, it is now enacted by 51 & 52 Vict. c. 64, s. 4, that "a fair and accurate report published in any newspaper of the proceedings of a public meeting or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select Committees of either Houses of Parliament (*a*), justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged unless it shall be proved that such report or publication was published or made maliciously." The section goes on to except from its protection cases in which the publication in question is blasphemous and indecent, cases in which there has been a refusal to insert a reasonable letter of explanation or contradiction, and cases in which the matter published is not of public concern and for the public benefit. Considerable difficulty will probably arise as to the effect to be given to this last exception, but it obviously imposes on reporters the responsibility of excluding all irrelevant matter of a defamatory nature which may be dragged into a public discussion. A public meeting is defined to be "any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted" (*b*).

Newspapers.

Comment and criticism.

With regard to the right of comment and criticism two

(*a*) It seems clear that with respect to committees of Parliament the enactment is unnecessary. There is no distinction between such a committee and a Court of Law. See *Goffin* v. *Donnelly*, (1880) 6 Q. B. D. 307.

(*b*) 51 & 52 Vict. c. 64, s. 4.

questions arise: first, what is meant by comment; secondly, what are the topics in respect of which comment is allowable.

Justifiable and licentious comment.

1. As has been already pointed out, comment which is nothing more than inference and remark, obviously, and as it were necessarily arising out of a state of facts proved to exist, needs no privilege. It comes under the plea of justification. "God forbid," says Alderson, B., "you should not be allowed to comment on the acts of all mankind, provided you do it justly and truly" (*a*). But such acts as are considered public property are "open to what may be called licentious comment as opposed to comment that must be based in truth" (*b*).

Licentious comment does not include statements of fact.

It is with "licentious," or permissible, comment that we now have to deal, and it must always be borne in mind that such comment, though it need not rigidly conform to fact, yet must have some reasonable basis in fact. This is implied in the word itself. For a comment there must be a text. The licence which the law gives in respect of drawing inferences is great, but it does not permit the fabrication of premises. It is not, therefore, because a certain topic is one of general interest, that random defamatory statements may be made with regard to the reputations of individuals who may have been concerned in the matter. "To say that you may first libel a man and then comment on him is obviously absurd" (*c*). "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct" (*d*). The line, however, between statement and discussion is one which it is not always easy to draw, and in

(*a*) *Gathercole* v. *Miall*, (1846) 15 M. & W. p. 340.

(*b*) *Per* Pollock, C.B., *ibid.* p. 334.

(*c*) Cockburn, C.J., *Reg.* v. *Carden*, (1879) 5 Q. B. D. p. 8.

(*d*) *Per Cur.*, *Davis* v. *Shepstone*, (1886) 11 App. Cas. p. 190. See, too, *Popham* v. *Pickburn*, (1862) 7 H. & N 891; *per* Erle, C.J., *Walker* v. *Brogden*, (1865) 19 C. B. N. S. p. 74 *Purcell* v. *Sowler*, (1877) 2 C. P. D. 215.

some of the cases exaggerated assertions of fact, in themselves defamatory, have been allowed to pass muster as coming within the protection of comment (*a*).

Must adhere to the text.

Not only must there be a fitting text for the comment, but the comment must be confined to the text. One portion of a man's life may be public property, but it is not therefore lawful to comment on the whole (*b*). If a book or play is criticised the author may be attacked for the ignorance, bad taste, or absurdity which he shows in his work, but he must be dealt with as an author and not as a man. If his general character is assailed, this is not criticism but the making of defamatory assertions (*c*).

Must not be perversely unjust.

Moreover though a publication be genuine comment, it does not necessarily follow that it is "fair," not because it is malicious, nor because it is irrelevant, but because it is perversely unjust (*d*). Although even in such extreme circumstances, it is doubtful whether, apart from wilful misstatement as to the sentiments contained in, or wilful misquotation of passages from, the adversely criticised book or play, the injurious comments will support an action for libel (*e*). A person taking on himself publicly to criticise and condemn the conduct and motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure" (*f*). The exercise of the discretion thus entrusted to juries will depend partly on popular sentiment, partly on the nature of the subject-matter. Such greater latitude no doubt will be allowed in dealing

(*a*) *Kelly* v. *Tinling*, (1865) L. R. 1 Q. B. 699; *Davis* v. *Duncan*, (1874) L. R. 9 C. P. 396. In *Cox* v. *Feeny*, (1863) 4 F. & F. 13, Cockburn, C.J., held that the publication of a report containing statements of fact defamatory to the plaintiff was privileged because it was information which it was important for the public to know; and in *South Hetton Coal Co.* v. *North-Eastern News Association, Limited*, (1894) 1 Q. B. 133, misstatements and exaggerations were assumed, but were treated only as evidence for the jury of unfairness.

(*b*) See, however, *Seymour* v. *Butterworth*, (1862) 3 F. & F. 372. But this case seems open to considerable doubt.

(*c*) *Carr* v. *Hood*, (1808) 1 Camp. 355, n.; *Campbell* v. *Spottiswoode*, (1863) 3 B. & S. 769.

(*d*) *Merivale* v. *Carson*, (1887) 20 Q. B. D. 275.

(*e*) *McQuire* v. *Western Morning News*, (1903) 2 K. B. 100, C. A.

(*f*) *Per Cur.*, *Wason* v. *Walter*, (1868) L. R. 4 Q. B. p. 96.

with matters of taste and opinion than with matters involving questions of conduct and character (*a*).

Basis of comment.

2. The basis for comment may be facts which are notorious and undisputed—facts of common knowledge and contemporary history; it may be matter already lawfully published, such as privileged reports; it may be matter put forward by the plaintiff himself, as in the case of criticism of a book; or it may be facts which are proved for the first time by the defendant.

Broadly speaking, there seem to be two classes of cases in which free comment is held allowable; those in which the public interest arises out of the subject-matter itself, and those in which the complaining party has himself challenged public attention.

Matters of Church and State.

(a.) Everything which directly affects the welfare of Church and State is clearly a matter of general public interest, and there can be no dispute as to the privilege of discussion with regard to the policy of the government, the administration of justice, the proceedings of the legislature, the conduct of the executive in civil and military affairs, and generally the manner in which all those who may be called public servants discharge their duties (*b*).

Local administration.

There are, however, many matters which might at first sight seem purely local in their bearing, but which, nevertheless, are considered of interest to the nation at large as being parts of a general system. In *Purcell* v. *Sowler*, the Common Pleas Division, holding the conduct of a local poor law official not a privileged topic, laid down the rule as follows:—"Where this kind of privilege is invoked, it must be shown either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole country. . . . It is not enough to show that he fills a public character of a limited kind and in a limited

(*a*) If the passage from *Wason* v. *Walter*, quoted above, be compared with the definitions of fair criticism given in *Merivale* v. *Carson*, *supra*, it will be found that the latter are expressed in laxer terms. The reason probably is, that in the one case the character of a man was in question, in the other the character of a play.

(*b*) *Wason* v. *Walter*, (1868) L. R. 4 Q. B. 73; *Henwood* v. *Harrison*, (1872) L. R. 7 C. P. 606.

district, or that the subject-matter dealt with is a matter of interest only to a small portion of the public or to the public in a limited district, and not a matter of general public interest" (*a*).

In the Court of Appeal (*b*) the principle thus laid down was not questioned, but the explanation given of it was widely different. The poor law being a matter of national importance, it was denied that any distinction could be taken between its local and its general administration. "It is one of the characteristic features of the government of this country that, instead of being centralised, many important branches of it are committed to the conduct of local authorities. Thus, the business of counties and that of cities or boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern" (*c*). The previous decision of *Kelly* v. *Tinling* (*d*) is quite in accordance with these observations. In that case it was held privileged to discuss as a matter of general public importance the precise manner in which worship was carried on in a particular church (*e*). On the same principle it would probably be held that the affairs of any institution in the administration of which the State had any voice, such as for example one of that numerous class, under the control of the Charity Commissioners, are matters of general public interest.

Institutions free from public control.

Institutions which are entirely in private hands, whatever their importance, are not properly liable to be discussed by the world at large, unless indeed the support or intervention of the public is in some way invited. There seems, for example, no reason to suppose that there would, except under special circumstances, be any right to comment on the affairs of the various Nonconformist

(*a*) (1877) 1 C. P. D. p. 788.
(*b*) (1877) 2 C. P. D. 215.
(*c*) *Per* Cockburn, C.J., (1877) 2 C. P. D. p. 218.
(*d*) (1865) L. R. 1 Q. B. 699.
(*e*) See, too, *Walker* v. *Brogden*, (1865) 19 C. B. N. S. 65, and *Gathercole* v. *Miall*, (1846) 15 M. & W. 319, in which case the Court were equally divided as to the right of discussing the clergyman's sermon. In order that a member of the public may have sufficient interest to obtain a faculty for the removal of an illegal ornament from a particular church, it is necessary for him to show that he is a parishioner: *Kensit* v. *St. Ethelburga* (*Rector*), (1900) P. 80; *Darey* v. *Hinde*, (1903) P. 221.

bodies, which, of course, are purely voluntary associations. In *Gathercole* v. *Miall* (*a*), the plaintiff, a beneficed clergyman, had established in his parish, with the assistance of certain other people, a charitable society. For the principles on which this charity was managed he was attacked in the defendant's newspaper. It was decided that there was no right of comment on this matter, not because the society was merely of local importance, but because it was entirely private and voluntary in its nature.

In the case of *South Hetton Coal Co.* v. *North Eastern News Association* (*b*), however, the Court of Appeal adopted a view which went far beyond any of the previously decided cases. They thought that the conduct of a private business, if of sufficiently large an extent and relating to a sufficiently large number of persons, will be a matter of public interest, and may be commented on as such. In that case the plaintiffs were colliery proprietors and landlords of the bulk of the cottages in a village of a population of two thousand. The Court were of opinion that the sanitary condition of these cottages which were let by the plaintiffs to their colliers might be commented on as a matter of public interest. That expression of opinion, however, was not strictly necessary to the decision, the jury having found that the defendants had exceeded the limits of fair comment.

Criticism is invited.

(b.) The true ground on which that special kind of comment known generally as criticism seems to rest is that he who appeals to the public must be judged by the public. Every "man," says Lord Ellenborough in a well-known passage, "who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right" (*c*). This right has been so universally accepted that before the decision in *Merivale* v. *Carson* the law of literary and artistic criticism had been nowhere fully discussed. There is no doubt however that every species of literary production

Literary and artistic criticism.

(*a*) *Supra*, p. 608.

(*b*) (1894) 1 Q. B. 133. The question whether a particular matter is of public interest or not is for the judge to decide: *ibid.*

(*c*) *Carr* v. *Hood*, (1808) 1 Camp. p. 358.

down to a newspaper (*a*) is fair game for the critic: and even the handbill of an advertising tradesman has been dealt with on the same principle (*b*). Works of art (*c*) at a public exhibition, public performances, both musical and dramatic (*d*), have to undergo the ordeal of public judgment, whether expressed through the press, or in case of the latter, by the immediate applause or censure of the audience (*e*). Whether there is equal liberty with regard to the works of an architect, except so far as they are in themselves of a public nature, may be doubted. No one is invited to give an opinion as to the skilfulness which has been displayed in the erection of a private house, except the person who has given the order (*f*).

Appeals to the public.

Appeals of every kind through the press and platform are daily being made to the public intelligence, the public conscience, and the public pocket. Whatever the nature of these appeals or the position of those who make them, discussion is clearly invited, and that discussion is free. One man promulgates a quack remedy (*g*), another man invites attention to a scheme for the suppression of quacks (*h*). A Presbyterian divine proposes to convert China wholesale to Christianity (*i*), a popular agitator proposes to convert England wholesale to republicanism (*k*). All such projectors and benefactors of their species are liable to have their methods and ends considered, ridiculed, and condemned.

Malice.

The right or privilege of publishing defamatory matter must (excepting in cases of absolute privilege) be exercised for the purpose of attaining the objects for which it is given. The ostensible motive of the party making the publication in such

(*a*) *Campbell* v. *Spottiswoode*, (1863) 3 B. & S. 769.

(*b*) *Paris* v. *Levy*, (1860) 9 C. B. N. S. 342.

(*c*) *Thompson* v. *Shackell*, (1828) M. & M. 187.

(*d*) *Dibden* v. *Swan*, (1793) 1 Esp. 27; *McQuire* v. *Western Morning News*, (1903) 2 K. B. 100, C. A.

(*e*) *Gregory* v. *Duke of Brunswick*, (1843) 1 C. & K. 24. The right to criticise dramatic performances, even in the absence of any evidence of conspiracy, has, however, been impugned, possibly on the ground that public demonstrations of approval or disapproval may tend to a breach of the peace.

(*f*) As to architects, see *Soane* v. *Knight*, (1827) M. & M. 74; *Botterill* v. *Whyteshead*, (1879) 41 L. T. N. S. 588.

(*g*) *Hunter* v. *Sharpe*, (1866) 4 F. & F. 983.

(*h*) See *Dunne* v. *Anderson*, (1825) 3 Bing. 88.

(*i*) *Campbell* v. *Spottiswoode*, (1863) 3 B. & S. 769.

(*k*) *Odger* v. *Mortimer*, (1873) 28 L. T. N. S. 472.

cases is to serve the legitimate interest of himself or of other people, but if the plaintiff can show that his motive is not the true one, that the defendant has misused the occasion for some illegitimate purpose of his own, he disposes of his defence. The absence of proper motive is called express malice or malice in fact. Express malice is sometimes said to be a real thing as opposed to malice in law or implied malice, which is a mere technical expression. In truth, however, they are fundamentally identical. A libel is malicious in law until a probability of right motive is shown; it is malicious in fact after that probability is disposed of by the evidence. In both cases the conclusion is the same though arrived at in different ways. The plaintiff commences by showing a conscious violation of his right, and to that he returns.

Absence of right motive.

It seems, therefore, a mistake to say, as is sometimes done, that the jury on the issue of express malice, have to find affirmatively the existence of bad motive in the defendant's mind. They have simply to negative the right or privilege. If they are satisfied of the absence of proper motive they need not carry their inference further. If they are satisfied of the presence of a bad motive they may find for the plaintiff, not because the defendant is to be punished for his malice by the loss of the protection to which *primâ facie* he is entitled, but because the presence of a bad motive is ground for inferring the absence of right motive, and therefore shows that there never was any right or privilege at all.

Definition of malice in fact.

"To illustrate that what is called malice in fact means nothing more or less than absence of legal excuse; suppose A. has untruly said B. is a thief under circumstances that, A. believing B. to be a thief, would constitute a legal excuse. A familiar instance of this is the case of giving, as it is termed, the character of a former *employée*. In the case supposed the material inquiry is: What was A.'s belief? To answer this inquiry, and only for the purpose of answering this inquiry, it may be material to ascertain what feeling A. had towards B.; if the feeling or intention is found to be friendly, it is a link in the chain of evidence that A. spoke believing what he said. If the feeling or intention of A. towards B. was unfriendly, it is a link in the chain of evidence

that A spoke rather from that feeling or intent, or for some purpose other than from his belief; and being spoken without belief of its truth, the speaking was out of the pale of legal excuse, and was wrongful, not merely or in any wise because of the intent, which may have been good or bad, but because the speaking was not under circumstances which constitute a legal excuse; namely, under a belief that the words spoken were true" (*a*).

Evidenced by unreasonable conduct.

Absence of rightness of conduct is evidence of absence of rightness of motive, and therefore it is sufficient evidence of malice if the defendant in the publication complained of has exhibited a lack of truth, candour, and reasonableness. It has been seen already (*b*) that privilege is not necessarily denied to a defamatory communication on account of the use of exaggerated language or the casual presence of an uninterested bystander (*c*) but such matters may become very material when it is inquired with what motive the communication was made. Therefore, where the defendant had employed the plaintiff on a piece of work and afterwards, in making a complaint to him on the subject, used, in the presence of a third party, the language which was the alleged cause of action, it was held that it was *primâ facie* privileged, but that the jury must say whether it was malicious or not (*d*).

"The simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed on this and similar communications, and if, on every occasion in which they are made, they were not protected unless strictly private. . . . The mere fact of a third person being present does not render the communication absolutely unauthorised, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge or been influenced by malicious motives" (*e*).

(*a*) Townsend on Slander and Libel, s. 90. But see the judgment of Brett, L.J., in *Clark* v. *Molyneux*, (1877) 3 Q. B. D. p. 247.

(*b*) See above, p. 583.

(*c*) Nor is privilege necessarily avoided by a person being called in for the express purpose of hearing the statement: *Taylor* v. *Hawkins*, (1851) 16 Q. B. 308.

(*d*) *Toogood* v. *Spyring*, (1834) 1 C. M. & R. 181.

(*e*) *Per Cur.*, *Toogood* v. *Spyring*, (1834) 1 C. M. & R. p. 194.

In many cases it has been decided that unnecessary violence of language is evidence of malice. Thus, in *Cooke* v. *Wildes* (*a*) the defendant, a deputy clerk of the peace, had ceased to employ the plaintiffs to do certain printer's-work for the county. He addressed a letter to the magistrates to explain his reasons and after a statement of facts, which showed the plaintiffs to have demanded unfair terms on false grounds, proceeded to speak of them as having attempted "to extort a considerable sum from the county by misrepresentation." This last expression, it was said, must be left to the jury as evidence of malice. "The whole letter certainly refers to the subject of printing the register, and no irrelevant calumny is introduced into it; but it contains strictures upon the motives and conduct of the plaintiffs which the facts stated may not warrant, and which may be considered quite unnecessary to vindicate what the defendant had done about the printing of the register and could be of no service to the Finance Committee, or to the Quarter Sessions, in auditing the account (*b*).

Violence of language.

It would seem from this case to be particularly incumbent on any one, who has to make a statement of facts for the guidance of others, to avoid indulgence in unnecessary comment or imputation of motives. Where, however, a man is acting in self-defence or in the vindication of his character, somewhat greater licence is allowed him, and his language is not to be scrutinised with minuteness in order to raise an inference of malice. In *Laughton* v. *The Bishop of Sodor and Man* (*c*), the plaintiff had severely inveighed against the bishop in a public speech. The latter addressed to his clergy and published in the newspapers a charge, in which he repelled with great warmth the plaintiff's attacks, impugning his motives and speaking of him as a wicked man. It was contended that this language was in itself evidence of malice. But, says the judgment (*d*), "it is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true and proper for

Strong language not always evidence of malice.

(*a*) (1855) 5 E. & B. 328.

(*b*) *Per Cur.*, *ibid.*, p. 340; see, too, *Wright* v. *Woodgate*, (1835) 2 C. M. & R. 573; *Cowles* v. *Potts*, (1865) 34 L. J. Q. B. 247; *per Cur.*, *Gilpin* v. *Fowler*, (1854) 9 Ex. p. 627.

(*c*) (1872) L. R. 4 P. C. 495.

(*d*) (1872) L. R. 4 P. C. pp. 508–9.

his own vindication, although in fact some of his expressions exceeded what was necessary for it; and that the language of his charge was more consistent with such honest belief and with the purpose of self-vindication than with that of injuring the plaintiff."

The language used must always be considered with regard to the facts, not as they were in reality but as they may be fairly taken to have appeared to the defendant. Vehemence of language is not in itself evidence of malice, but wanton violence is (*a*).

Knowledge of falsity of charge.

As a general rule it is not right to make defamatory statements unless they are believed to be true. It may indeed sometimes happen that where a confidential relationship exists, one man may communicate to another rumours and reports not as matters for which he himself vouches, but as requiring attention and fit to be investigated (*b*). But no one can suppose he has a right or a duty to make definite charges in which he does not believe, and, if he does so, he shows that absence of right motive which is malice. If he has spoken as of his own knowledge a *primâ facie* case against him is made by evidence showing the charge to be untrue. For although the truth is not directly in issue, yet his knowledge is; and if he has said that he knows as a fact something which is not a fact, he has uttered a falsehood and therefore is malicious. "Unquestionably the master who has given a bad character of a servant to persons inquiring after his character is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character to be false; and the question between the master and the servant will always, in such case, be whether what the former has spoken respecting the latter be malicious" (*c*).

In *Fountain* v. *Boodle* (*d*) the plaintiff had served the defendant as daily governess. She was dismissed without cause assigned. The defendant subsequently, in answer to an application as to the plaintiff's character, wrote that she had dismissed her "on

(*a*) *Spill* v. *Maule*, (1869) L. R. 4 Ex. 232. See *Neville* v. *The Fine Arts Gen. Ins. Co.*, (1895) 2 Q. B. 156; *Royal Aquarium, &c., Society* v. *Parkinson*, (1892) 1 Q. B. 431.

(*b*) *Per* Bramwell, L.J., *Clark* v *Molyneux*, (1877) 3 Q. B. D. p. 244.

(*c*) *Per* Lord Alvanley, C.J., *Rogers* v. *Clifton*, (1803) 3 B. & P. p. 591.

(*d*) (1842) 3 Q. B. 5.

account of her incompetency and not being ladylike nor good-tempered." The plaintiff swore that no complaint had been made to her during the engagement, and certain of her friends gave evidence as to her being competent, ladylike, and good-tempered. It was held that a case was made out requiring an answer, and that in the absence of any evidence from the defendant to show on what grounds she had acted, the jury might presume the character not to have been honestly given.

Where, however, the publication complained of imputes some specific piece of misconduct or incapacity to the plaintiff, it will not avail him to give general evidence of his good conduct or capacity, since it is perfectly possible that a man may have acted on the particular occasion in opposition to his general character, and therefore such evidence does not substantially tend to prove the falsity of the charge (*a*). It is not necessary, in order to establish a *primâ facie* case of malice, to show that all the imputations made are false: it is enough that some of them are (*b*).

Where, however, the libellous statement as to character was made in answer to a deceptive letter forwarded for the purpose of entrapping the defendant, the deceit of the plaintiff will avoid his right of action (*c*).

Direct evidence of ill-will.

A plaintiff may be able to show from extrinsic facts that the defendant harboured feelings of spite and ill-will towards him, and it may thence be fairly inferred that the publication in question was prompted by such feelings and, consequently, not by a legitimate motive. It by no means, however, follows that this inference must of necessity be drawn. The jury in such a case ought to satisfy themselves that the ill-will caused, as well as accompanied, the action. "Suppose a man to be applied to for the character of a servant, and he is angry with that servant and says, 'He is a bad servant, he has stolen my spoons,' that communication would be privileged if a man has acted *bonâ fide*, intending honestly to discharge a duty. . . . . Suppose a reporter for the press bore malice towards a person a party to the action,

(*a*) *Brine* v. *Bazalgette*, (1849) 3 Ex. 692.

(*b*) *Per Cur.*, *Blagg* v. *Sturt*, (1847) 10 Q. B. p. 905.

(*c*) *King* v. *Waring*, (1803) 5 Esp. 14.

and published a fair report of the proceedings injurious to him. I incline to think that, as he would be performing a kind of duty, it ought to be taken that he is acting under privilege. I do not think that the public press has any peculiar privilege" (*a*). These observations must be taken, it would seem, as indicating Lord Bramwell's view of the caution that ought to be given to juries in dealing with the evidence, not as deciding that under such circumstances as he suggests, the question of malice could be withheld from them. It would probably be found that if they were once satisfied of a feeling of ill-will in the defendant's mind, they would not easily be prevented from finding also that such feeling caused the publication.

Previous defamation.

"You may give in evidence any words as well as any act of the defendant to show *quo animo* he spoke the words which are the subject of the action" (*b*). Therefore defamatory language used towards the plaintiff by the defendant on other occasions, whether prior (*c*) or subsequent to the cause of action, will be good evidence of malice. It is not, however, admissible for a plaintiff to administer interrogatories to a defendant for the purpose of eliciting from him previous statements derogatory to his character (*d*).

In the case of slanderous words spoken subsequent to the cause of action, it may, however, become the duty of the judge to warn the jury against necessarily inferring that an ill feeling, first shown to exist after the date of the publication complained of, was its antecedent and cause. The facts may be consistent with the ill feeling having a later origin (*e*).

Conduct of litigation.

Motive may be shown by the conduct of the litigation and the manner in which the case is shaped at the trial. Therefore, where a defendant, who pleaded the truth of the libel, in court neither attempted to establish the plea, nor yet would retract the charge, it was held that by so acting he afforded evidence of

(*a*) *Per* Bramwell, L.J., *Stevens* v. *Sampson*, (1879) 5 Ex. D. p. 55. And now see 51 & 52 Vict. c. 64, s. 3.

(*b*) *Per* Lord Ellenborough, C.J., *Russell* v. *Macquister*, (1807) 1 Camp. p. 49 n.

(*c*) *Barrett* v. *Long*, (1851) 3 H. L. C. 395; *Darby* v. *Ouseley*, (1856) 1 H. & N. 1.

(*d*) *Caryll* v. *Daily Mail Publishing Co.*, (1904) 90 L. T. 307, C. A.

(*e*) *Hemmings* v. *Gasson*, (1858) E. B. & E. 346.

a malicious motive in the publication. "Malice proved to exist at the time of the trial but connected with the subject-matter of it, may well be believed to have existed at the time of speaking the words" (*a*). However, merely to put a plea of justification on the record is perfectly consistent with good faith, and will, therefore, afford no evidence of malice (*b*).

General lack of good faith.

In *Jackson* v. *Hopperton* (*c*) the plaintiff had been in the defendant's service. He charged her with stealing some money but did not dismiss her. She subsequently left his service on another ground. He offered to take her back and say nothing about the money. He also offered to give her a character if she would confess the theft. This she refused to do, and subsequently, in answer to inquiries, he again asserted the charge. It was held that there was a general lack of good faith about his conduct, which entitled the jury to consider that his real motive was spite at the plaintiff's leaving his employment, and not a desire to give proper information.

Slight evidence suffices in case of volunteered communications.

If a defamatory publication is made, not in the interest of the party himself nor in the discharge of a special duty, nor in pursuance of any invitation, the motives by which it was prompted are generally more or less open to suspicion. Slight evidence of malice, therefore, will suffice in the case of an officious and purely voluntary communication (*d*). Where the defendant, after appearing against the plaintiff in a county court, spontaneously sent a report of the proceedings to a newspaper, this was held sufficient to justify a finding of malice; the evidence of a bad motive was small, but the probability of a good motive was smaller (*e*).

Liability of corporation for malice.

The question whether the malice of an agent will render a corporation liable for a libel published on a privileged occasion is discussed elsewhere (*f*).

Damages.

In applying the general principles of the law of damages to actions of defamation, there are certain special considerations

(*a*) *Per Cur.*, *Simpson* v. *Robinson*, (1848) 12 Q. B. p. 514.

(*b*) *Wilson* v. *Robinson*, (1845) 7 Q. B. 68.

(*c*) (1864) 16 C. B. N. S. 829.

(*d*) *Pattison* v. *Jones*, (1828) 3 M. & Ry. 101.

(*e*) *Stevens* v. *Sampson*, (1879), 5 Ex. D. 53.

(*f*) *Citizens Life Assurance Co.* v. *Brown*, (1904) A.C. 423. And see above, pp. 60–61.

which require discussion. This is a kind of action, as already pointed out, in which (except in some kinds of slander) no proof of actual damage is necessary. The plaintiff, therefore, need only lay before the jury the words or writing of which he complains, and leave them to say to what amount of compensation he is entitled from the mere fact of such imputations having been made (*a*). The general damages, however, may be aggravated by evidence of the circumstances of the publication, of the conduct of the defendant with reference thereto, and of the effect which it has actually produced.

Aggravation.

Extent of publication.

The extent of the damage which defamatory matter may cause must clearly depend to a great degree upon the extent of the publicity given. It is one thing for a man to be libelled in a private letter read by a single correspondent, another for him to be held up to the hatred, contempt, or ridicule of the general public in a newspaper or placard. Therefore, even though the defendant in his pleadings admit the publication, the plaintiff is nevertheless entitled to prove its manner and extent (*b*). If a libel has appeared in a newspaper, the plaintiff is not confined to the damage likely to have been caused by the publication of the particular copy which he gives in evidence, but may also invite the jury to consider the extent to which copies have been multiplied and circulated. "In order to show the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared, for the purpose of showing the extent of the circulation" (*c*).

Spirit and intention.

"The spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff (*d*). It is more grievous to be defamed out of personal spite and ill-will than through mere lack of proper care and consideration. In the former case there is insult as well as injury. The malice which aggravates damages is not merely the absence of right motive, as in the case of privilege, but the presence of some bad motive. The jury may even take into con-

(*a*) *Tripp* v. *Thomas*, (1824) 3 B. & C. 427.

(*b*) *Vines* v. *Serell*, (1835) 7 C. & P. 163.

(*c*) *Per* Pollock, C.B., *Gathercole* v. *Miall*, (1846) 15 M. & W. p. 331.

(*d*) *Per Cur.*, *Pearson* v. *Lemaitre* (1843) 5 M. & G. p. 720.

sideration the malicious conduct of the defendant subsequent to the publication, as evidence of the spirit in which the publication was made (*a*).

It will be a matter of aggravation if the defendant has persistently and deliberately given publicity to the defamation complained of (*b*), if he has on other occasions disparaged or assailed the plaintiff's reputation, if in his conduct of the litigation he has shown a spirit of determined hostility, has persisted in unfounded imputations and introduced new ones (*c*). The plaintiff is not precluded from giving other acts of the defendant in evidence to prove malice, by the fact that they are in themselves causes of action, but the jury should be cautioned to treat them, not as independent heads of damage, but only as mere matters of aggravation (*d*).

Actual damage.

A plaintiff is entitled to damages by reason of the mere probability that consequences injurious to him may ensue from the defamation, but he may strengthen his case by proving that such consequences have in fact ensued. If, for instance, he has been held up to ridicule in a newspaper, he may show that this has led to his being laughed at by particular persons (*e*). Similarly, a tradesman, of whom a widely-circulated libel has been published, may prove a general falling off of custom, even though he does not allege it in his pleading (*f*). Thus, where a shipowner was libelled in a newspaper in respect of his management of one of his vessels and claimed no special damage, he was allowed to give in evidence the amount to which the profit of the next voyage had fallen below the average (*g*). But in such cases

(*a*) *Praed* v. *Graham*, (1889) 24 Q. B. D. 53.

(*b*) *Delegall* v. *Highley*, (1837) 8 C. & P. 444; *Plunkett* v. *Cobbett*, (1804) 5 Esp. 136.

(*c*) *Per* Cockburn, C.J., *Risk Allah Bey* v. *Whitehurst*, (1868), 18 L. T. N. S. p. 620; *per* Cockburn, C.J., *Blake* v. *Stevens*, (1864) 4 F. & F. p. 240. It is said in *Warne* v. *Chadwell*, (1819) 2 Stark. 457, that if other libels are given in evidence by the plaintiff to prove malice, the defendant may justify such libels. Great practical inconvenience would attend such a rule. See below, p. 624.

(*d*) *Per Cur.*, *Pearson* v. *Lemaitre*, (1843) 5 M. & G. p. 720. See, however, *Darby* v. *Ouseley*, (1856) 1 H. & N. 1.

(*e*) *Cook* v. *Ward*, (1830) 6 Bing. 409; see *Goslin* v. *Corry*, (1844) 7 M. & G. 342.

(*f*) *Harrison* v. *Pearce*, (1858) 32 L. T. O. S. 298; *Bluck* v. *Lovering*, (1885) 1 Times L. R. 497. In some cases proof of loss of professional income, or falling off of business, is essential to maintenance of action: *Dockerell* v. *Dougall*, (1899) 80 L. T. 556.

(*g*) *Ingram* v. *Lawson*, (1840) 6 Bing.

the plaintiff gives the evidence in question merely for the purpose of emphasising the fact that that has actually happened which the law would presume without proof. "It is not special damage, it is general damage resulting from the kind of injury he has sustained" (*a*). He may also prove special or consequential damage, provided he claims it in his pleading, but not otherwise (*b*).

Special damage. Acts of third persons.

From the nature of things the special or consequential damage must almost invariably be connected with the defamation by the intervening act of some third person (*c*). A. defames B. to C., and C. thereupon acts in a manner which causes damage to B. The act of C., under such circumstances, may be perfectly lawful. He may be a customer of B., and cease to deal with him, or he may impose more onerous terms on him (*d*), or being his employer may give him due notice to quit (*e*). It may, though unlawful in fact, be lawful on the assumption that the charge made by A. is true, as, for instance, if C. be the employer of B. and dismiss him without notice on a false charge of dishonesty. Finally, the act of C. may be unlawful even supposing the charge is true. In the first two cases A. is liable for the consequences (*f*), but in the third he is not, for the law does not recognise it as natural that any one should knowingly do what is illegal (*g*).

Repetition, when defendant liable for

A frequent consequence of the publication of a slander is that it is repeated to other people by those to whom it is first published. Upon the question whether the original utterer of the slander is liable for damage ensuing from its repetition, the following rules seem to be established by the cases:—

Where repetition intended.

1. Where the slander was intended to be repeated, as where it

N. C. 212; overruling in effect *Delegall* v. *Highley*, (1837) 8 C. & P. 444.

(*a*) *Per* Pollock, C.B., (1858) 32 L. T. O. S. 298.

(*b*) *Bluck* v. *Lovering*, (1885) 1 Times L. R. 497.

(*c*) In *Allsop* v. *Allsop*, (1860) 5 H. & N. 534, it was attempted to prove illness resulting from defamation as a special damage, but it was held not a natural consequence.

(*d*) *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.*, (1905) 91 L. T. 722, C. A.

(*e*) As to when damage in this case is too remote, see *Speake* v. *Hughes*, (1904) 1 K. B. 138, C. A.

(*f*) *Newman* v. *Zachary*, (1646) Aleyn, 3; *Davis* v. *Gardiner*, (1593) 4 Rep. 16 b; *per* Lord Campbell, *Lynch* v. *Knight* (1861) 9 H. L. C. pp. 590–1; explaining *Vicars* v. *Wilcocks*, (1806) 8 East, 1.

(*g*) *Lynch* v. *Knight*, (1861) 9 H. L. C. 577.

is told to a notorious tale bearer and tattler with the very hope that its circulation in the neighbourhood will be thereby secured (*a*), the original utterer will be responsible for the repetition although he did not in fact authorise it (*b*). He cannot be heard to say that the damage resulting from such repetition is too remote. The case of *Parkes* v. *Prescott* (*c*) may seem at first sight opposed to this view. Defamatory statements having been made against the plaintiff at a Board of Guardians, the defendants used various expressions indicating a desire that the reporters present should publish these statements in the local press, and they were in consequence published. The defendants were sued, not in respect of the original slanders, which were not actionable, but in respect of the libels which appeared in the newspapers, and the majority of the Court held that there was evidence to fix them with liability as the publishers of such libels, adding, however, "that loose expressions of a mere wish or hope that proceedings should be published would not be sufficient to fix liability on the defendants in cases like the present" (*d*). Here, however, the decision was on the question of authority, not on the question of intention. It was clearly necessary to show that the defendants were parties to the wrongful act alleged, since otherwise they could not be liable at all; but if a wrongful act is once proved against a man he may be liable for consequential acts to which he is not a party, provided such acts have naturally followed.

Many cases might be put in which the intention of the defendant would be a material element. Suppose A. should receive a scandalous anonymous letter. He shows it to B., expressing his intention of horse-whipping the writer if he can be discovered. B. hoping and intending that A. will carry out his threat, falsely and maliciously says that the letter is in the writing of C., and A. thereupon assaults C. It is apprehended

(*a*) Lady Sneerwell: "Did you circulate the report of Lady Brittle's intrigue with Captain Boastall?"

Snake: "That's in as fine a train as your ladyship could wish. In the common course of things I think it must reach Mrs. Clackitt's ears within four-and-twenty hours; and then, you know, the business is as good as done." School for Scandal, act 1, sc. 1.

(*b*) *Per* Lopes, L.J., *Speight* v. *Gosnay*, (1891) 60 L. J. Q. B. p. 232; *per* Bowen, L.J., *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 530.

(*c*) (1869) L. R. 4 Ex. 169.

(*d*) *Ibid.*, p. 177.

that, though ordinarily an illegal act is not a natural consequence, B. ought in this case to be liable to C. for the damage caused by the assault, insomuch as it was a result he intended (*a*).

Where repetition antecedently probable.

2. Where the slander is uttered under circumstances under which it is *a priori* probable that it will be repeated, the original slanderer will be liable for the repetition although not in fact intended. For the purpose of determining what those circumstances are which will render repetition probable, the most important element to take into consideration is the number of persons to whom the original slander is published.

Slander published to single person.

(a.) Where the slander is published *to a single person*, it is (in the absence of circumstances which would render the repetition privileged) unlikely to be repeated, and therefore if it be in fact repeated, the original slanderer will not in general be liable for the consequences of the repetition. Thus in *Ward* v. *Weeks* (*b*), the defendant said to a single person, named Bryce, that the plaintiff was a rogue and swindler. Bryce repeated it to one Bryer, who, in consequence ceased to deal with the plaintiff. It was held that the defendant was not liable. So in *Dixon* v. *Smith* (*c*), where the defendant told an individual patient of the plaintiff, who was a surgeon, that the plaintiff had been guilty of incontinence, and the plaintiff claimed, not only for loss of that patient's custom, but also for a general falling off of custom, it was held that he could not recover for the latter, because it must have been the result of repetition, and such repetition was not under the circumstances the natural consequence of the slander.

Repetition of contents of private letter.

The same rule would seem to apply to a libel contained in a private letter. The writer of a libellous letter is *primâ facie* not answerable for any damage which may result if his correspondent shows the letter to a third party. No doubt in *Ratcliffe* v. *Evans* (*d*) Bowen, L.J. says generally: "In the case of a personal libel, general loss of custom may unquestionably be alleged and proved." But it is evident from the context that he was

(*a*) See above, p. 143, and observations there on *Chamberlain* v. *Boyd*, (1883) 11 Q. B. D. 407.

(*b*) (1830) 7 Bing. 211.

(*c*) (1860) 5 H. & N. 450; and see *Ayre* v. *Craven*, (1834) 2 A. & E. 2.

(*d*) (1892) 2 Q. B. p. 529.

there referring to libels published in newspapers or other widely-circulated documents, and not to a libel contained in a private letter (*a*).

Slander published to several persons.

(b.) Where the slander is published in the hearing of *several persons*, it is not improbable that it will be repeated, and in such case the defendant will be responsible for the repetition. Thus in *Evans* v. *Harries* (*b*) where a slander of a publican in the way of his trade was uttered in his public-house "in the presence and hearing of divers customers" the plaintiff was allowed to give evidence of a general diminution of profits, although such diminution might well have been due to a withdrawal of custom by persons other than the defendant's immediate audience. Similarly in *Riding* v. *Smith* (*c*) where the slander was uttered in the presence of three or more persons while on their way to church upon a public occasion, it was held that general loss of custom might be proved.

Where there is a duty to repeat.

3. Even where the slander is published only to a single person, and the defendant does not intend it to be repeated, he is nevertheless responsible if the hearer owes it as a duty to some one else to repeat to him what he has heard. For instance, where a husband, being informed that the plaintiff, a milliner with whom his wife was in the habit of dealing, was unchaste, told his wife, who withdrew her custom (*d*); where a slander was spoken of a constable in the presence of a police inspector, who in the discharge of his duty reported it to his superior officers, whereby the constable was dismissed from the force (*e*); in both cases the original slanderer was held liable.

Mitigation of damage

It is permissible to a defendant to seek to mitigate the damages to be awarded against him, by proving circumstances which show that he did not act with deliberate malice, or by impeaching the general reputation of the plaintiff. In certain cases he may

(*a*) The *dictum* of Grove. J., in *Clarke* v. *Morgan*, (1877) 38 L. T. N. S. p. 355, that a plaintiff in an action of slander "may give general evidence of damage, which must in most cases have been caused by the repetition of the slander," without regard to the question whether the original slander was published to one person or many, must be regarded as bad law.

(*b*) (1856) 1 H. & N. 251.

(*c*) (1876) 1 Ex. D. 91.

(*d*) *Derry* v. *Handley*, (1867) 16 L. T. N. S. 263.

(*e*) See *per* Lord Denman, C.J., *Kendillon* v. *Maltby*, (1842) Car. & M. p. 408.

prove that compensation has already been obtained for what is substantially the same injury. When the plaintiff seeks to recover special damage the defendant may rely on any facts which tend to disprove the connection between the defamation and the consequential injury alleged.

Provocation.

(a.) It is a mitigating circumstance if the publication of defamatory matter takes place under circumstances of strong provocation. Such provocation must, however, be *in pari materia* with the retaliation. It would not be available in mitigation of damages in an action of defamation to prove that the plaintiff had previously assaulted the defendant. It was formerly considered that one libel could not be considered as excusing another unless they both referred to the same subject-matter (*a*). The rule, however, appears now to be relaxed, and it is sufficient if the circumstances are such as to raise a fair presumption that the first defamation provoked the second (*b*). If two men set to work to libel each other, neither can have a claim for substantial damages (*c*).

A difficulty arises with regard to the admission in evidence of libels on the defendant published by the plaintiff, for if they are introduced, the latter, it would seem, ought in justice to be allowed to explain the circumstances attending their publication, to show that they were true or privileged: and this would involve the raising of a multiplicity of cross issues (*d*).

It is clear that nothing can be said to be a provocation which does not come to the knowledge of the person provoked. It is not, therefore, sufficient for the defendant to show merely that libels have been published of him by the plaintiff (*e*).

Mere repetition.

(b.) It seems to be considered a less malicious act to repeat than to originate a defamatory statement. Thus, in one case a defendant was allowed to prove that he had copied the libel, which

(*a*) *May* v. *Brown*, (1824) 3 B. & C. 113; *Tarpley* v. *Blabey*, (1836) 2 Bing. N. C. 437.

(*b*) *Per* Denman, C.J., *Moore* v. *Oastler*, (1836) 1 Moo. & R. 451 n. See *Watts* v. *Fraser*, (1837) 7 A. & E. 223.

(*c*) *Per* Mansfield, C.J., *Finnerty* v. *Tipper*, (1809) 2 Camp. p. 77.

(*d*) In *May* v. *Brown*, (1824) 3 B. & C. 113, Lord Tenterden allowed it to be asked generally, whether the plaintiff had libelled the defendant, but rejected evidence of particular libels. A general question of the same kind was rejected in *Wakley* v. *Johnson*, (1826) Ry. & Moo. 422. See above, p. 619.

(*e*) *Watts* v. *Fraser*, (1837) 7 A. & E. 223.

was the cause of action, from another publication, and had softened it in the process (*a*). In most of the cases, however, it is said that evidence of such a kind is not admissible, unless it appear on the face of the defamatory publication that it is a mere repetition, and the original authority be disclosed (*b*). The not very satisfactory reason for this rule would seem to be, that if a party defamed knows the person who originally attacked his character, he ought to proceed against him, and not against those who have merely handed on the scandal (*c*).

Apology.

(c) It has been held in an action for slander against a husband and wife, that an apology by the latter is not admissible as evidence, for the plaintiff, against the former (*d*). By 6 & 7 Vict. c. 96, s. 2, it is provided that in an action for libel contained in any public newspaper or other periodical publication, if shall be competent to the defendant to plead that such libel was inserted in such newspaper or periodical publication without actual malice and without gross negligence, and that before the commencement of the action, at the earliest opportunity, he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action (*e*).

Apology in public press.

(*a*) *Creevy* v. *Carr*, (1835) 7 C. & P. 64; see too *Mullett* v. *Hulton*, (1803) 4 Esp. 247; *Bennett* v. *Bennett*, (1834) 6 C. & P. 588; *East* v. *Chapman*, (1827) 2 C. & P. 570; *Duncombe* v. *Daniell*, (1837) 2 Jur. 32; but see *Talbutt* v. *Clark*, (1840) 2 Moo. & R. 312.

(*b*) *Mills* v. *Spencer*, (1817) Holt, 533; *Richards* v. *Richards*, (1844) 2 Moo. & R. 557; see, however, *Saunders* v. *Mills*, (1829) 6 Bing. 213.

(*c*) The rule may perhaps be a survival of the doctrine laid down in one of the resolutions in *The Earl of Northampton's Case*, (1612). "In a private action for the slander of a common person if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in an action of the case, if the truth be such, he may justify" (12 Rep. p. 134). It is quite certain, however, that the resolution and the notion underlying it are altogether exploded. See *De Crespigny* v. *Wellesley*, (1829) 5 Bing. 392; *M'Pherson* v. *Daniels*, (1829) 10 B. & C. 263; *Tidman* v. *Ainslie*, (1854) 10 Ex. 63.

(*d*) *Tait* v. *Beggs*, (1905) 2 Ir. R. 525.

(*e*) The section went on to provide for payment into Court, but this part is repealed (42 & 43 Vict. c. 59), being rendered unnecessary by the general provisions as to payment into Court in all cases; and see *Lafone* v. *Smith*, (1858) 3 H. & N. 735.

The first section of the same Act enables an offer of an apology to be pleaded in mitigation in all actions of libel.

Bad reputation of plaintiff.

(d.) A plaintiff who brings an action of defamation puts his reputation in issue. If he has none to lose, attacks on his character cannot have really injured him and cannot, therefore, entitle him to substantial damages. A defendant consequently may give evidence of the plaintiff's general bad reputation in respect of the subject-matter of the publication in question. It is, of course, immaterial, if the cause of action be an imputation of drunkenness, to show that the plaintiff is reputed dishonest. The evidence of reputation must be strictly general. If a particular act of misconduct is imputed it is not permissible to suggest that he has been guilty of similar misconduct on other occasions or has been charged with or suspected of such misconduct (*a*). It is to be observed that there are some cases in which the fact that a plaintiff is of bad reputation may have the effect of aggravating the injurious character of a defamatory statement. Thus an imputation of insolvency may serve to ruin a trader whose credit is tottering, while it would have no effect on a man of firmly-established commercial reputation.

Damages recovered for similar libel.

(e.) In ordinary cases where libels or slanders of the same effect and against the same person are published in more than one quarter, each publication is to be considered separately, and the jury are to say what damage they attribute to it (*b*). It is not, however, within the province of the jury to sever the damages, by allocating the particular proportions of a lump sum among the various tort feasors (*c*) although the measure of damages is the aggregate of the injury received from all (*d*). If A. and B. both published similar libels against C., and C. recovers damages against A., and then sues B., B. cannot prove the damages recovered against A. as a mitigation of the damages recoverable against himself, because the supposition is that the injuries are

(*a*) See the judgment of Cave, J., in *Scott* v. *Sampson*, (1882) 8 Q. B. D. pp. 498 *sqq.*, where all the authorities are collected.

(*b*) *Harrison* v. *Pearce*, (1858) 1 F. & F. 567.

(*c*) *Dawson* v. *M'Clelland & Others*, (1899) 2 Ir. R. 486; see also *Brown* v. *Allen & Another*, (1802) 4 Esp. 157.

(*d*) *Clark* v. *Newsam*, (1847) 1 Ex 131; Alderson, B., at p. 140.

distinct and the damages distinct. Practically however the result is that a man may be compensated half a dozen times over for what is in truth but one wrong. However, as regards newspapers, it is now enacted that "at the trial of any action for a libel contained in any newspaper, the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or brought actions for) damages, or has received, or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought" (*a*).

Negativing special damage.

(f.) Where a plaintiff alleges that in consequence of being defamed by the defendant he has suffered special damage, it is always open to the latter to suggest that the damage in question is attributable to other causes. If a customer be called to prove that he has ceased to deal with the plaintiff in consequence of the defendant's imputations, he may be asked if he did not act also on other reports which reached him, and what those reports were (*b*). If a plaintiff has suffered a general loss of custom and has been defamed in more than one quarter, the jury must consider the probabilities of the case and make such apportionment of the loss as they can (*c*).

(*a*) 51 & 52 Vict. c. 64, s. 6. In s. 5 of the same Act are contained provisions for the consolidation of actions for libel, where the publications sued on are substantially the same.

(*b*) *King* v. *Watts*, (1838) 8 C. & P. 614. See too *Hopwood* v. *Thorn*, (1849) 8 C. B. 293.

(*c*) *Harrison* v. *Pearce*, (1858) 1 F. & F. 567. It has been held that on a statement of special damage by loss of custom the customers themselves must be called: *Barnett* v. *Allen*, (1858) 1 F. & F. 125.

CHAPTER XVIII.

MALICIOUS WORDS AND SLANDER OF TITLE.

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Words actionable as causing damage.

Slander of title.

WORDS cannot of themselves amount to a direct infringement of any right except that of reputation, and cannot therefore, apart from consequences, give a cause of action except when they are defamatory of the person complaining. They may, however, be the cause of damage to a man in the conduct of his affairs, and such damage may amount to a legal wrong. If property of any kind is for sale, and any one, without lawful motive, comes forward and falsely alleges that any incumbrances, charges, or liabilities exist with respect to it, or otherwise impeaches or cuts down the right or capacity of the vendor to make a good conveyance, and in consequence the bargain goes off, an action lies, which is commonly known under the name of "slander of title."

This "is not properly an action for words spoken or for libel written or published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (*a*). The precise language used is still, however, a material part of the cause of action, in all cases actual malice being a necessary ingredient in an action for slander of title (*b*); and where malice is proved, but not otherwise, an injunction may be granted to restrain a slander of title before any actual damage has been sustained (*c*). In *Gutsole* v. *Mathers* (*d*), where the plaintiff simply set out in his declaration the substance of certain misrepresentations as to his title to goods, judgment

(*a*) *Per Cur.*, *Malachy*, v. *Soper*, (1836) 3 Bing. N. C. pp. 384–5.

(*b*) *Hargrave* v. *Le Breton*, (1769) 4 Burr. 2423.

(*c*) *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, (1903) 20 T. L. R. 88; reversed on ground that no evidence of malice had been adduced, (1904) 20 T. L. R. 579, C. A.

(*d*) (1836) 1 M. & W. 495.

was arrested after verdict on the ground that no cause of action appeared on the face of the pleading.

The requisite factors for maintaining an action for slander of title are thus summarised by Lord Davey. "To support such an action it is necessary for the plaintiffs to prove:—

"(a) That the statements complained of were untrue;

"(b) That they were made maliciously—that is, without just cause or excuse;

"(c) That the plaintiffs have suffered special damage thereby" (*a*).

It may be slander of title to allege of anyone that he is selling goods in infringement of a patent or a copyright (*b*). By 46 & 47 Vict. c. 57, s. 32, a right of action is given to anyone damnified by wrongful threats of proceedings for infringement on the part of some one claiming to be a patentee (*c*).

False claim of lien.

In *Green* v. *Button* (*d*) the plaintiff had contracted for the purchase of certain wood, but he was unable to obtain delivery owing to the defendant falsely alleging an agreement under which he had a lien on the goods for monies advanced to the plaintiff, and it was held that there was a good cause of action for slander of title.

Slandering quality of goods.

Analogously, it is actionable to disparage the quality of a man's goods and thereby prevent their sale (*e*).

(*a*) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, (1901) 18 Pat. Cas. Rep. 95. at p. 99.

(*b*) See *Wren* v. *Wield*, (1869) L. R. 4 Q. B. 730; *Dicks* v. *Brooks*, (1880) 15 Ch. D, 22; *Hart* v. *Wall*, (1877) 2 C. P. D. 146; but see *Capital & Counties Bank* v. *Henty*, (1882) 7 App. Cas. 741, Blackburn, J., at p. 777.

(*c*) The section does not apply where "the person making such threats with due diligence commences and prosecutes an action for the infringement of his patent." As to what will constitute "threats," see *Driffield & East Riding Pure Linseed Cake Co.* v. *Waterloo Mills Cake & Warehousing Co.*, (1886) 31 Ch. D. 638; *Combined Weighing & Advertising Co.* v. *Automatic Weighing Machine Co.*, (1889) 42 Ch. D. 665; *Skinner & Co.* v. *Shew & Co.*, (1893) 1 Ch, 413. As to what is "due diligence," see *Colley* v. *Hart*, (1890) 44 Ch. D. 179. See also *Barrett* v. *Day*, (1890) 43 Ch. D. 435; *Challender* v. *Royle*, (1887) 36 Ch. D. 425; *Kensington & Knightsbridge Electric Lighting Co.* v. *Lane Fox Electrical Co.*, (1891) 2 Ch. 573.

(*d*) (1835) 2 C. M. & R. 707.

(*e*) *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.*, (1874) L. R. 9 Ex. 218. This principle seems to be assumed in *White* v. *Mellin*, (1895) A. C. 154, though upon another ground doubts are in that case thrown upon the above-mentioned case; and see *Linotype Co.* v. *British Empire Type Setting Co.*, (1899) 81 L. T. 331, H. L. (E.); *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, (1899) 1 Q. B. 86, C. A.; *Allcott* v. *Millar's Karri & Jarrah Forests, Ltd.*, (1905) 91 L. T. 722, C. A.

Other false statements causing damage.

In the old case of *Shepherd* v. *Bateman* (*a*), the plaintiff lost her marriage through the defendant falsely and maliciously alleging that she was already married, and it was held that she had a good cause of action. In *Riding* v. *Smith* (*b*), the plaintiff, a shopkeeper, lost custom through its being falsely and maliciously alleged that his wife, who assisted in the business, had misconducted herself on his premises, and the Court decided that the action was maintainable. "If a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff" (*c*).

General effect of cases.

The effect of these various authorities seems to be that a wrong is committed, and a corresponding remedy given, whenever false statements maliciously made produce, as a natural consequence, damage which is capable of legal estimation.

Words must be false and malicious.

The plaintiff must in the first place strictly prove the words complained of, as in an action for defamation (*d*). He must prove that they are false, and he must prove that they are

Malice must be proved in fact.

malicious (*e*). The distinction between express and implied malice does not seem to exist in this form of action. There may be something analogous to a claim of privilege on the defendant's part; he may say, for example, that he only slandered the plaintiff's title in defence of his own. In such a case it will be for the plaintiff to prove a lack of good faith. Even, however, should there be no duty or interest on the defendant's part, the matter will not be necessarily concluded against him. Malice must still be found as a fact. That he had no good ground or reasonable occasion for the publication in question may be strong evidence

Damage.

of that fact, but it is nothing more. Finally, actual damage must be proved. It will be seen therefore that an action in the nature

(*a*) (1661) 1 Sid. 79.

(*b*) (1876) 1 Ex. D. 91.

(*c*) *Riding* v. *Smith*, (1876) 1 Ex. D. Kelly, C.B., at p. 93; and see *supra*, cases under tit. Defamation.

(*d*) *Gutsole* v. *Mathers*, (1836) 1 M. & W. 495.

(*e*) *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, (1904) 20 T. L. R. 579, C. A.

of slander of title, or as it might perhaps be more properly called an action for malicious words, differs in several points from an action for defamation. It remains to consider these points more in detail.

The words must be proved false.

1. In an action for defamation the plaintiff must allege the falsity of the publication in question, but he need not prove it. It is for the defendant to raise the issue, and the burden of proof lies upon him. In an action for malicious words the burden of proof lies upon the plaintiff (*a*). Where character is at stake the assumption is in favour of the party defamed, but there is no similar assumption in favour of the goodness of a man's title to property or of the quality of his merchandise. Unless he shows falsehood "the plaintiff shows no case to go to the jury" (*b*). It is true that in one case (*c*) Lord Ellenborough said it was sufficient if the declaration alleged that the publication in question was "malicious, injurious, and unlawful," without the word "false" being added. He cannot, however, have meant that truth was immaterial, and therefore in all probability merely intended to decide that the falsity was a necessary implication from the other words.

Malice—absence of good faith.

2. It has been already pointed out that in defamation privilege depends not on what a defendant may have supposed to be his interest or duty, but upon what a judge decides his duty or interest, in fact, to have been (*d*). In the form of action now under consideration good faith is always a defence. In *Gerard* v. *Dickenson* (*e*), the defendant slandered the plaintiff's title to his manor by alleging that she had a lease of it for ninety years, and it was resolved that although she admitted by her plea that in fact she had no title to the said lease, but was altogether a stranger to it, yet the mere slander of itself, without knowledge of its falsity, gave no cause of action. It was further, however, resolved that the declaration was good in so much as it went on to allege that the defendant knew that "the lease was forged and counterfeited,

(*a*) *Burnett* v. *Tak*, (1882) 45 L. T. 743.

(*b*) *Per* Maule, J., *Pater* v. *Baker*, (1847) 3 C. B. p. 869, quoted with approval by Montague Smith, J., *Steward* v. *Young*, (1870) L. R. 5 C. P. p. 127.

(*c*) *Rowe* v. *Roach*, (1813) 1 M. & S. 304.

(*d*) See above, p. 586.

(*e*) (1590) 4 Rep. 18 a.

and yet (against her own knowledge) she has affirmed and published that it was a good and true lease" (*a*).

Absence of reasonable cause only evidence of malice.

In another action for slander of title the jury were told that they were to give a verdict for the defendant, if they thought that in publishing the matter complained of he had acted on such grounds as would have persuaded a man of sound sense and knowledge of business. It was held, however, that this was a misdirection, and that the sole question was whether he had acted honestly and in good faith (*b*). So, in *Pater* v. *Baker* it is laid down that proof of actual malice is necessary. "The jury *may* infer malice from the absence of reasonable and probable cause but they are not *bound* to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action" (*c*). Again, in *Wren* v. *Wield* (*d*), where the plaintiffs complained that the defendant had alleged certain machines of their manufacture to be infringements of his patent, the following passage occurs: "We think the action could not lie unless the plaintiffs affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had; but a *malâ fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation" (*e*).

Mere falsity not sufficient.

There are indeed *dicta*, though no express decision, that malice is not necessary in this form of action, and that it is enough if the false statement was made without lawful cause. In *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.* (*f*), Bramwell, B., expressly so stated the law; and in the later case of *Dicks* v. *Brooks* (*g*), the same Judge in delivering the judgment of the Court of Appeal seems to have followed his former opinion. There the plaintiff had published a certain pattern which was considered by the defendant to be an infringement of his copyright. The latter thereupon put forth a circular saying, "We

(*a*) (1590) 4 Rep. p. 18 b.

(*b*) *Pitt* v. *Donovan*, (1813) 1 M. & S. 639.

(*c*) *Per* Maule, J., (1847) 3 C. B. p. 868.

(*d*) (1869) L. R. 4 Q. B. 730.

(*e*) *Per Curr.*, *ibid.* p. 737; see too *Hargrave* v. *Le Breton*, (1769) 4 Burr. 2423; *Smith* v. *Spooner*, (1810) 3 Taunt. 246; *Steward* v. *Young*, (1870) L. R. 5 C. P. 122; *Brook* v. *Rawl*, (1849) 4 Ex. 521.

(*f*) (1874) L. R. 9 Ex. p. 222,

(*g*) (1880) 15 Ch. D. 22,

give you notice that if you sell or offer for sale, exhibit or distribute any copy of the subject, 'The Huguenot,' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." An injunction and also an inquiry as to damages were claimed. This circular, it was said (*a*), "may have been intended as a statement of the defendant's view of the law (*b*), but anybody might not unreasonably take it as a statement of the fact that somehow or other they had got such a right to the subject that, let it be reproduced in whatever form it might be, such reproduction was an infringement of their rights. I think, therefore, that if damages had been traced to the circular an action would have been maintainable." According to this decision the sole question is whether the defendant has made incorrect statements or not. No reference is made to malice throughout the case; no evidence of it appears on the face of the report. In the later case of *Halsey* v. *Brotherhood* (*c*) the authority of the earlier cases was expressly recognised, and the above quoted observations of Lord Bramwell were explained away. It seems, therefore, clear that a plaintiff can never recover damages unless the jury find malice in fact. Inquiries as to the defendant's interest or duty in the matter will be material, not as raising a distinct issue of privilege, but solely as throwing light on the motives of the publication.

Action only for the actual damage.

3. The action will not lie where actual damage does not result (*d*). "The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of this sort has been insisted upon for centuries" (*e*). In *Malachy* v. *Soper* (*f*) the declaration alleged that by reason of matter published by the defendant certain mining shares which the plaintiff

(*a*) *Per* Bramwell, L.J., 15 Ch. D. p. 40.

(*b*) As to a misstatement of law in this kind of action, see *Mildmay's case*, (1582–4) 1 Rep. 175 a.

(*c*) (1880–2) 19 Ch. D. 386. In *Mellin* v. *White*, (1894) 3 Ch. p. 280, Lindley. L.J., in stating what it is necessary to prove in this form of action omits to mention malice. But from the fact that he was a party to the decision in *Halsey* v. *Brotherhood*, it is to be inferred that the omission was *per incuriam*. In the same case of *Mellin* v. *White*, Lopes, L.J., held malice to be essential. In the House of Lords, (1895) A. C. 154, the point was left open.

(*d*) *Evans* v. *Harlow*, (1844) 5 Q. B. 624; *White* v. *Mellin*, (1895) A. C. 154.

(*e*) *Per* Bowen, L.J., *Ratcliffe* v. *Evans*, (1892) 2 Q. B. p. 532.

(*f*) (1836) 3 Bing. N. C. 371,

possessed had become "much depreciated and lessened in value, to wit, in the value of £50 . . . and the plaintiff had been hindered and prevented from selling or disposing of his said shares, . . . and . . . from gaining, acquiring, or deriving divers profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him." It was held that the averments were insufficient. "The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease; and that it will not be sufficient to say only that he had an intent to sell without alleging a communication for sale. . . . There must be an express allegation of some particular damage resulting to the plaintiff" (*a*). By the expression particular damage is to be understood nothing more than an actual or temporal loss which has in fact occurred. Thus a general loss of custom as distinct from the loss of particular known customers is sufficient to support the action (*b*), provided the words complained of were published under such circumstances as to prevent the claim for such damage from being open to the objection, that the loss of the custom must have been due to unauthorised repetition of the slander, and consequently was too remote (*c*).

Rival traders.

Actions of this kind have in modern times generally arisen as between rival traders, in cases in which a dealer in a particular commodity has published a statement disparaging the quality of his rival's goods. Even as between such parties an action will, in general, only lie in respect of such a statement, if it satisfies the above-mentioned requirement, of being false, malicious, and followed by damage (*d*). But it must be borne in mind that malice in this context, so far as it refers to the motive with which the defendant acted, means spite, a desire to injure the plaintiff as an end in itself, and does not include a desire to benefit the defendant at

(*a*) *Per Cur.*, *Malachy* v. *Soper*, (1836) 3 Bing. N. C. p. 384.

(*b*) *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 524.

(*c*) As to what those circumstances are, see above, pp. 620 *sqq.*, where the subject is fully discussed.

(*d*) *White* v. *Mellin*, (1895) A. C. 154. In this particular case none of the conditions were satisfied. There was no evidence that the statement complained of was false, no evidence of malice, and no suggestion of damage; and see *supra*, *Linotype Co.* v. *British Empire Type Setting Co.*, (1898-9) 81 L. T. 331. See also *Alcott* v. *Millar's Karri & Jarrah Forests, Ltd.*, (1905) 91 L. T. 722.

the plaintiff's expense. A desire to draw away the plaintiff's customers is in itself perfectly legitimate. It is only when improper means are employed to gain that end that such a motive becomes malicious. And the only means which for this purpose the law will regard as improper is fraud, that is to say, the making of the false statement with a knowledge of its falsity (*a*). If one man publishes from a motive of pure spite a disparaging statement with regard to another's goods, presumably an action will lie if it turn out to be untrue, even though he did not know it to be untrue (*b*). On the other hand if the defendant did not act from spite, but from a desire to benefit himself, it will be essential to show that he knew his statement to be false (*c*). In *Young* v. *Macrae* (*d*), where a declaration was held bad which alleged that the defendant, in a published description of his own goods, untruly alleged them to be superior to those of the plaintiff, Cockburn, C. J., conceded that if a trader published matter which was false to his own knowledge of the goods of another, and damage followed, an action would lie. In point of fact, however, a trader, in disparaging his rival's goods, never acts from spite, but always with the object of benefiting himself. It seems, therefore, that in an action against a trader for a slander of that kind it is practically essential to prove his knowledge of the falsity, and that the necessity of proving that knowledge is not confined to cases in which the disparagement complained of consists in a comparison of the defendant's goods with the plaintiff's to the disadvantage of the latter, but applies also where the disparaging statement contains no specific reference to the defendant's goods. The case of *Western Counties Manure Company* v. *Lawes' Chemical Manure Co.* (*e*) no doubt seems to decide the contrary, but that case has been much commented upon (*f*), and is probably not law.

(*a*) See Lord Herschell's explanation of the term "maliciously" in *White* v. *Mellin*, *supra*, at p. 160. See too the judgments in *Mogul Steamship Co.* v. *McGregor*, *Gow & Co.*, (1892) A. C. 25, on the limits of fair competition, and the discussion on that subject, above, pp. 22–26; and see *Hubbuck* v. *Wilkinson*, (1899) 1 Q. B. 86, C. A.

(*b*) *Per* Maule, J., *Pater* v. *Baker*, (1847) 3 C. B. pp. 868–9.

(*c*) *Gerard* v. *Dickenson*, (1590) 4 Rep. 18 a.

(*d*) (1862) 3 B. & S. 264; 32 L. J. Q. B. 6.

(*e*) (1874) L. R. 9 Ex. 218.

(*f*) *White* v. *Mellin*, (1895) A. C. 154.

Where, indeed, the only disparagement of the plaintiff's goods consists in the defendant's vaunting the superiority of his own goods, it has on another ground been doubted whether the action will lie, namely, that of the undesirability of turning the courts of law "into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better" (*a*). And this reason for refusing to entertain the action would seem to apply even to a case in which the defendant knew his statement to be untrue.

(*a*) *Per* Lord Herschell, *White* v. *Mellin*, (1895) A. C. 154 at p. 164, approving the judgment of Lord Denman in *Evans* v. *Harlow*, (1844) 5 Q. B. 624. See too *per* Lord Shand, *White* v. *Mellin*, p. 172.

CHAPTER XIX.

MALICIOUS PROSECUTION.

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Wrongfully setting the law in motion.

It is obviously a grievance that an individual should be harassed by legal proceedings improperly instituted against him. If there is no foundation for them no doubt they will not ultimately succeed, but during their progress they may cause great injury. It is the right of every one to put the law in motion if he does so with the honest intention of protecting his own or the public interest, or if the circumstances are such, be his motives what they may, as to render it probable *primâ facie* that law is on his side. But it is an abuse of that right to proceed maliciously, and without reasonable and probable cause for anticipating success.

Nature of damage thereby caused.

Such an abuse may of necessity be injurious, as involving damage to character, or it may in any particular case bring about damage to person or property. There are, says Lord Holt (*a*), three sorts of damage to a plaintiff, any one of which is sufficient to support an action of malicious prosecution. "First, damage to his fame if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses." To which may be added the damage which a man suffers when his house is entered and his property seized. Whenever a plaintiff can show that he has suffered under any of these heads of damage by reason of the defendant having wrongfully put the law in motion against him, whether civilly or

(*a*) *Savill* v. *Roberts*, (1698) 12 Mod. p. 208.

Legal damage seldom results from abuse of civil proceedings.

criminally, he has a remedy (*a*). It is true that it is only under exceptional circumstances that a man against whom an unreasonable and malicious action has been brought can obtain reparation for the wrong by means of a separate action; this, however, is not because of any difference in principle between the abuse of civil or criminal process, but because generally in such a case no damage can be proved. There is no damage to reputation because "in no action, at all events in none of the ordinary kind, not even in those based upon fraud, where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury, but the bringing of the action is of itself no injury to him. When the action is tried his fair fame will be cleared if it deserves to be cleared; if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action" (*b*). Neither can a man suffer in his person from the mere fact of being sued. A party may indeed by a special step of procedure cause the arrest of his debtor, though only, as the law now stands, in very exceptional circumstances, and if such arrest is malicious an action lies. Finally, for the expense to which a defendant is put he finds as a general rule a sufficient remedy in the law of costs. "The law has provided that no man should prosecute without finding pledges (*c*), and that was a security against troublesome actions; then if the plaintiff's suit be vexations and groundless he shall be amerced *pro falso clamore;* and though these amerciaments be now matter of form, and therefore several Acts of Parliament have given costs to the defendants, yet we must judge by the reason of the law as it stood antiently, but in case of an indictment there is no provision or remedy but by bringing an action" (*d*).

Costs.

Malicious prosecution.

It is, therefore, the malicious preferring of an unreasonable

(*a*) For statutory restrictions, see the Vexatious Indictments Act, 22 & 23 Vict. c. 17, and the Vexatious Actions Act, 59 & 60 Vict. c. 51.

(*b*) *Per* Bowen, L.J., *Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. pp. 689–90.

(*c*) See for example, 11 Hen. VII. c. 15. This practice is of course now entirely obsolete.

(*d*) *Per* Holt, C.J., *Savill* v. *Roberts*, (1698) 12 Mod. p. 210.

criminal charge that is the usual foundation for the form of action now under consideration; and this is what is ordinarily understood by the familiar title of an action of malicious prosecution. It will be seen that it bears some analogy to an action of defamation (*a*); insomuch as it is in the first place an action for the vindication of character, which is necessarily involved in a criminal charge, and only in the second place for the damage shown to have arisen under the special circumstances of the case.

Abuse of process.

And as an action lies for malicious words, though not defamatory, if they cause special damage, so there are certain cases, now of infrequent occurrence, in which an action lies for the special damage caused by abuse of legal process where no criminal charge is made, and consequently no question of character is involved.

In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious.

Prosecution on a criminal charge.

1. The term *criminal charge* includes "all indictments involving either scandal to reputation or the possible loss of liberty to the person" (*b*). There are, however, many cases in which, though the proceedings follow the forms of the criminal law, they are substantially civil in their nature. No one regards a man convicted on an indictment for the non-repair of a highway as a criminal (*c*). A moral stigma will inevitably attach where the law visits an offence with imprisonment, but it may attach also where a fine only can be inflicted, as where proceedings are taken

(*a*) See *per* Bowen, L.J., *Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. p. 692.

(*b*) *Ibid.*, p. 691.

(*c*) Similarly an attachment is sometimes punitive in its nature, sometimes simply a means of enforcing obedience. In the one case it is criminal, in the other civil in its nature (*In re Freston*, (1883) 11 Q. B. D. 545; *In re Gent*, *Gent-Davis* v. *Harris*, (1888) 40 Ch. D. 190; *In re Armstrong*, *Ex parte Lindsay*, (1892) 1 Q. B. 327; *Reg.* v. *Barnardo*, (1889) 23 Q. B. D. 305, 308). In the one case, therefore, it is apprehended an action might lie in respect of proceedings for an order of attachment, since they would be necessarily injurious to reputation; while in the other there would be no injury unless there were actual damage.

against a traveller for attempting to avoid payment of a tramway fare (*a*). At the same time there are many regulations which the State has laid down for the public convenience, and of which the infraction is punished by a fine, but which it is apprehended could not give rise to an action for malicious prosecution on the ground of scandal to reputation; for instance, a man's reputation could hardly suffer because he was proceeded against for laying a drain pipe in an improper manner, or keeping a pig in an improper place. It has been pointed out already that it is defamatory to say of any one that he has committed an offence for which he can be made to suffer corporally (*b*). *A fortiori*, therefore, is it injurious to his character to formally accuse him of such an offence. It is to be noticed, however, that the distinction taken in the old cases is that no action lies for damage to character where the charge is not in its nature "scandalous." Therefore, it was held in *Savill* v. *Roberts* (*c*) that a defendant who had preferred against the plaintiff an indictment for riot, on which he was acquitted, could not be liable except for the expense of preparing the defence. So, in another case (*d*) it was said that the mere preferring of an indictment for assault involved no injury to the good fame of the plaintiff. It is difficult to see on what grounds it can be maintained that a charge of breaking the peace conveys no imputation on the character of the person charged, and it may be doubted whether the authority of the cases above mentioned would now be recognised on this point. It is to be observed that formerly, in cases of slander by imputation of a criminal offence, a similar distinction was held to prevail between accusations which were simply defamatory and accusations which were "scandalous," and it was said that the latter only were actionable (*e*); but this distinction would appear to be now obsolete. Presumably an application to the Court to strike a solicitor off the rolls for misconduct would be a proceeding upon

(*a*) *Rayson* v. *South London Tramways Co.*, (1893) 2 Q. B. 304. As to when a principal is, and is not, responsible for the malicious act of his agent towards a third party, see *Farry* v. *Great Northern Ry.*, (1898) 2 Ir. R. 352; *Knight* v. *North Metropolitan Tramways Co.*, (1898) 78 L. T. 227.

(*b*) See above, pp. 555 *sqq.*; *Webb* v. *Beavan*, (1883) 11 Q. B. D. 609.

(*c*) (1698) 12 Mod. 208.

(*d*) *Byne* v. *Moore*, (1814) 5 Taunt. 187.

(*e*) See *Turner* v. *Ogden*, (1703) 6 Mod. 104.

a criminal charge for which an action for malicious prosecution would lie.

Maliciously exhibiting articles of the peace.

If articles of the peace have been exhibited, or sureties of the peace have been demanded, maliciously and without cause against the plaintiff, and he has been imprisoned in consequence of failing to find sureties, he may recover damages in respect of such imprisonment (*a*), but it does not seem clear whether he has any right of action in respect of the injury to his character as well as the injury to his person. An action will lie for false imprisonment (without presumption of malice) against the governor of a gaol, either for the reception of a prisoner without a proper warrant of commitment (*b*), or for the action of his agents in detaining a prisoner after his acquittal (*c*).

Illegal imprisonment.

What is a prosecution.

To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question. If a charge is made to a police constable, and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment, on the ground that he has directed the arrest, and therefore it is his own act and not the act of the law. But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution. "The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (*d*). A justice of the peace can only take action on an information laid before him. If he thinks that it discloses ground for believing that an offence has been committed, he either issues a warrant for the arrest of the incriminated party or a summons commanding his attendance. But until he issues such summons or warrant the prosecution cannot be said to begin. The gist of the action for malicious prosecution is that the defendant set the magistrate in motion. "Laying the

(*a*) *Steward* v. *Gromett*, (1859) 7 C. B. N. S. 191; but see *Cutler* v. *Dixon*, (1585) 4 Rep. 14 a.

(*b*) *Dormer* v. *Cook*, (1903) 88 L. T. 629.

(*c*) *Mee* v. *Cruickshank*, (1902) 86 L. T. 708.

(*d*) *Per* Willes, J., *Austin* v. *Dowling*, (1870) L. R. 5 C. P. p. 540; cp. *Lock* v. *Ashton*, (1848) 12 Q. B. 871.

information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced?" (*a*). Although when once a summons is issued, the commencement of the prosecution relates back to the laying of the information (*b*). By parity of reasoning the preferring of a bill of indictment directly before a grand jury (in cases in which there have been no previous proceedings before a magistrate) would not be the commencement of a prosecution, so as to justify an action if the bill is ignored. The same observation would apply to proceedings before the Committee of the Incorporated Law Society, on an application to strike a solicitor off the rolls, where they find that there is no *primâ facie* case of misconduct.

Search warrant.

There is one form of magisterial procedure in criminal cases which stands on a special footing. If information is given that stolen goods are in the possession of any one, a warrant may issue to search his premises, where they are supposed to be concealed, and, if they are found, to arrest him (*c*). There is no doubt that an action lies in respect of the entry and arrest under such a warrant if it is improperly procured (*d*); but it is not clear whether the issue of the warrant can of itself be regarded as a prosecution, and actionable as involving an injury to character. In *Wyatt* v. *White* (*e*), which was an action for maliciously procuring the issue of a search warrant, Willes, J., at *nisi prius* allowed no damages except for the invasion of the plaintiff's premises and the seizure of his person, but it does not appear whether the question as to character was raised before him.

Where magistrate acts of his own motion.

A person who simply makes a candid statement of facts to a magistrate without formulating any charge, is not responsible for the consequences of any step which the magistrate may thereupon, in the exercise of his discretion, think fit to take. The

(*a*) *Per* Brett, M.R., *Yates* v. *The Queen*, (1885) 14 Q. B. D. p. 657; see too *per* Cotton, L.J., *ibid.* p. 661; *per* Patteson, J., *Gregory* v. *Derby*, (1839) 8 C. & P. p. 750, where it was said that even the issue of a warrant not followed by an arrest would not give a cause of action. See *King* v. *Cole*, (1796) 6 T. R. 640.

(*b*) *Thorpe* v. *Priestnall*, (1897) 1 Q. B. 159, at p. 162.

(*c*) 24 & 25 Vict. c. 96, s. 103.

(*d*) *Elsee* v. *Smith*, (1822) 1 D. & R. 97.

(*e*) (1860) 29 L. J. Ex. 193.

magistrate acts of his own motion and not at the instigation of the person giving the information, who, therefore, is not to be considered as a prosecutor (*a*). But if an actual charge is made, though in an indefinite form and as a mere matter of suspicion and hearsay, a prosecution is thereby instituted (*b*). The prosecutor is answerable for the ulterior consequences, and it is not open to him to say that they were due to the mistake or indiscretion of the tribunal which he has put in motion (*c*). The distinction between cases where mere information is given and cases where a charge is made is necessarily somewhat fine. In one case (*d*) it was held that, where a defendant had laid an information before a magistrate under 48 & 49 Vict. c. 69, s. 10, that there was reasonable cause to suspect that the plaintiff was detaining a girl for immoral purposes, and the magistrate thereupon issued a search warrant, the defendant, not having in any way deceived the magistrate, could not be liable for the manner in which the latter had thought fit to exercise his discretion. This decision turned to a great extent on the language of the statute in question, but it has since been followed as an authority in an action which was brought for maliciously procuring a search warrant to issue for goods alleged to be stolen (*e*) These two cases appear to establish the proposition that under ordinary circumstances a person applying for a search warrant is not to be considered a "prosecutor," but merely a person giving information for the consideration of a magistrate; the latter acting on his own motion and not at the instigation of the informant (*f*).

Where a charge made.

(*a*) *Cohen* v. *Morgan*, (1825) 6 D. & R. 8; *per* Erle, C.J., *Steward* v. *Gromett*, (1859) 7 C. B. N. S. p. 204; *per* Lord Campbell, C.J., *Farley* v. *Danks*, (1855) 4 E. & B. p. 499.

(*b*) *Elsee* v. *Smith*, (1822) 1 D. & R. 97; *Davis* v. *Noake*, (1816–7) 6 M. & S. 29: *Wyatt* v. *White*, (1860) 29 L. J. Ex. 193.

(*c*) See *per* Brett, M.R., *Quartz Hill Consolidatad Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. p. 684, dissenting from a contrary expression of opinion by Martin, B., in *Johnson* v. *Emerson*, (1871) L. R. 6 Ex. pp. 379–80.

(*d*) *Hope* v. *Evered*, (1886) 17 Q. B. D. 338; see also *Lea* v. *Charrington*, (1889) 23 Q. B. D. 45; W. N. 1889, p. 150.

(*e*) *Utting* v. *Berney*, (1888) 5 Times L. R. 39.

(*f*) Some, however, of the language used in *Hope* v. *Evered*, (1886) (see *per* Lord Coleridge, C.J., 17 Q. B. D. p. 340), seems hardly consistent with the law as laid down in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674, *supra*. Great stress is laid on the fact that the magistrate in issuing a search warrant acts judicially, but in all actions of malicious prosecution the essence of the plaintiff's case is that he has been wronged by means of a judicial act.

Apparently, however, a justice, who, after applying his mind in a judicial manner to an information laid before him, showing reasonable cause, issues his warrant, is not liable in an action for malicious procedure merely because the judicial act results in a tort, it having been held by Russell, C.J., in the case of *Jones* v. *German* (*a*) (in which judgment was given for the defendant) that "an allegation of the actual commission of a felony is not necessary to justify a magistrate in granting his warrant."

Deceiving tribunal.

It is quite clear, however, that a defendant who has misled a tribunal by dishonest evidence and thereby caused it to act to the prejudice of the plaintiff is liable, even though he may not have purported to be the prosecutor (*b*).

Effect of binding over to prosecute.

If a magistrate decides to commit a case for trial, he is empowered to bind over the prosecutor to attend and prosecute at the Court by which the accused is to be tried (*c*). The mere fact, however, that a man has been bound over does not necessarily prove that he is the person responsible (*d*), neither on the other hand, if he is the person who in truth has started the prosecution, can he shelter himself from liability in respect of the subsequent proceedings by the plea that he was acting under legal compulsion and in obedience to the magistrate's order (*e*). In *Fitzjohn* v. *Mackinder* (*f*), the plaintiff and defendant had been parties to a suit in the County Court and had given evidence in direct contradiction to one another. In reality the perjury was on the side of the defendant, but the judge took a view adverse to the plaintiff, committed him for trial on a charge of perjury, and bound over the defendant to prosecute (*g*). The defendant duly presented an indictment before the grand jury, went before them, and repeated his perjured evidence. A true bill was found, the plaintiff was put on his trial and ultimately

(*a*) (1896) 2 Q. B. 418.

(*b*) *Per* Lord Campbell, *Farley* v. *Danks*, (1855) 4 E. & B. p. 499; *per* Lord Coleridge, *Hope* v. *Evered*, (1886) 17 Q. B. D. p. 340.

(*c*) 11 & 12 Vict. c. 42, s. 20.

(*d*) *Eager* v. *Dyott*, (1831) 5 C. & P. 4.

(*e*) *Dubois* v. *Keats*, (1840) 11 A. & E. 329. See also *Mittens* v. *Foreman*, (1889) 58 L. J. Q. B. 40, where the Court refused to stay an action for malicious prosecution as frivolous and vexatious on the ground that the defendant was the trustee under the plaintiff's bankruptcy and had prosecuted him by order of the Court under s. 16 of the Debtors Act, 1869.

(*f*) (1860–1) 8 C. B. N. S. 78; 9 C. B. N. S. 505.

(*g*) Under 14 & 15 Vict. c. 100, s. 19,

acquitted. He then brought an action for malicious prosecution, and it was decided in the Exchequer Chamber, reversing the judgment of the Common Pleas, that the action was maintainable. Two of the judges in the Court below decided for the defendant on the ground that he had only remotely caused the County Court judge's order for prosecution, and that his subsequent conduct was protected by that order. Willes, J., dissenting, held that he could not plead an order obtained by his own fraud and perjury. In the Court above Cockburn, C.J., and Channell, B., held that the defendant was liable as having procured the order, liable as having preferred the bill, and liable as having given false evidence before the grand jury. Bramwell, B., however, was of opinion that he was only liable on the last ground; that he was bound to prosecute, but not bound to prosecute by means of false evidence. On the other hand Blackburn and Wightman, JJ., were prepared to affirm the judgment of the Court below. It will thus be seen that there was an exactly equal division of judicial opinion in this case, and that the judges whose view ultimately prevailed were not altogether agreed as to the grounds of their judgment. In *Barber* v. *Lesiter* (*a*) it was held that an allegation that the defendant caused it to appear that the plaintiff was the proprietor of an illicit still, in consequence of which he was prosecuted by the Excise authorities, could not amount to an allegation of a prosecution by the defendant.

Indirectly causing prosecution.

A defendant may become liable by holding himself out as prosecutor, or allowing himself to be considered as such, though in reality he is only acting as agent for others (*b*).

Holding self out as prosecutor.

A defendant (which term includes a corporation (*c*)) may be liable in this as on other torts for acts done with his authority or subsequently ratified (*d*). If an agent institutes a prosecution within the scope of his employment and in pursuance of a general authority, any malice or unreasonableness which may actuate him in so doing are imputed to his principal. In this way an action of malicious prosecution may be maintained against a

Principal and agent.

(*a*) (1859) 7 C. B. N. S. 175.

(*b*) *Clements* v. *Ohrly*, (1847) 2 C. & K. 686.

(*c*) *Citizens Life Assurance Co.* v. *Brown*, (1904) A. C. 423.

(*d*) For criminal liability of master for act of servant, see *Coppen* v. *Moore*, (1898) 2 Q. B. 306.

corporation, which is itself, of course, incapable of malice (*a*). If, however, a principal himself controls a prosecution and simply employs a ministerial agent to carry out the proceedings, the fact that the agent was malicious or had reason to know the prosecution ill-founded, will not it seems affect his innocent principal (*b*). In either case, if the state of mind of the agent is such as to make his participation in the unfounded proceedings wrongful, he is liable.

Maliciously continuing proceedings.

A malicious prosecution may consist in the wrongful continuance of proceedings already set on foot by other persons. Such continuance, however, will not in itself amount to a ratification of the antecedent steps; and it may well be that under such circumstances there may be good cause for the continuance of a prosecution, the initiation of which was wrongful (*c*).

Determination of prosecution.

2. The reason why a plaintiff cannot as a rule succeed if a prosecution, of which he complains, terminates adversely is that otherwise there might be a conflict between civil and criminal justice, and all the issues, the conclusive determination of which properly belongs to the criminal court, might be tried over again by a sort of informal appeal (*d*). It makes no difference that the conviction took place before some court of inferior jurisdiction against which no appeal lay to a higher court. The convicted person will not be allowed to do indirectly that which he cannot do directly (*e*). In view of the recent decision in the Scotch case of *Wilson* v. *Bennett* (*f*) this proposition must, however, be taken with some reservation. Sometimes, however, from the circumstances of the case, it is impossible that the proceeding in question should have been determined in the plaintiff's favour. Thus, if his house is ransacked under a search warrant and nothing is found there to incriminate him, the matter goes no farther, but it cannot be said to be decided in his favour. Yet in such a case he would have a right of action if malice and

Ex parte proceedings.

(*a*) On this subject, see above, pp. 60 *sqq.*, where the matter is fully discussed; and see *Edwards* v. *Midland R. Co.*, (1880) 6 Q. B. D. 287.

(*b*) *Johnson* v. *Emerson*, (1871) L. R. 6 Ex. 329.

(*c*) *Weston* v. *Beeman*, (1858) 27 L. J. Ex. 57; see too *Moon* v. *Towers*, (1860) 8 C. B. N. S. 611.

(*d*) *Per Cur.*, *Castrique* v. *Behrens*, (1860–1) 3 E. & E. p. 721.

(*e*) *Basebé* v. *Matthews*, (1867) L. R 2 C. P. 684.

(*f*) (1904) 6 F. 269, Ct. of Sess.

absence of reasonable cause were shown (*a*). So, if articles of the peace are exhibited in the King's Bench against a man and he is called on to find sureties of the peace, he is not allowed to controvert the matters stated on affidavit against him, and consequently he is not precluded in any future proceeding from questioning the order which was made *ex parte* against him. The same rule formerly applied when sureties of the peace were demanded before a magistrate (*b*). But now in such a case the procedure is regulated by 42 & 43 Vict. c. 49, s. 25, and both parties and their witnesses are heard and examined.

The right of action against persons who put in force the Lunacy Act, 1890, by presenting to the judicial authority created by that Act a petition for a reception order, has already been dealt with (*c*).

Prosecution must come to legal end.

So long as proceedings are pending no action lies on the ground that they have been wrongfully instituted (*d*). It must appear that they were brought to a "legal end." Where the plaintiff alleged that he had been arrested on a false charge and subsequently discharged from imprisonment, it was held that he did not sufficiently show on the face of his declaration the termination of the proceedings (*e*). The end, however, need not be a final and conclusive one. If a magistrate refuses to commit for trial a person charged before him (*f*), the particular prosecution is concluded, although it may be lawful to institute a fresh prosecution for the same offence. It is in fact not necessary for the plaintiff to prove that he was absolutely in the right, but rather that the matter of which he complains so terminated as not to be inconsistent with his right to maintain his action. In *Craig* v. *Hasell* (*g*) the plaintiff sought to recover against the defendant for maliciously procuring an extent for a Crown debt to issue against him, and he alleged that the writ had been superseded and came to an end. To this it was pleaded that the

Determination need not be conclusive.

(*a*) *Wyatt* v. *White*, (1860) 29 L. J. Ex. 193. See above, p. 642.

(*b*) *Steward* v. *Gromett*, (1859) 7 C. B. N. S. 191.

(*c*) See above, pp. 211 *sqq.*

(*d*) "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust." *Per Cur.*, *Gilding* v. *Eyre*, (1861) 10 C. B. N. S. p 604.

(*e*) *Morgan* v. *Hughes*, (1788) 2 T. R. 225.

(*f*) *Delegal* v. *Highley*, (1837) 3 Bing. N. C. 950.

(*g*) (1843) 4 Q. B. 481.

supersedeas had been granted to the plaintiff at his request and upon terms, as an act of grace on the part of the Crown. It was held, however, that the plea was bad. "All that the rule of law in cases of malicious prosecution requires is that the writ of extent should be traced to its close; and that is done by showing it discharged by the Court though upon arrangement and by consent. . . . Such a termination of the case negatives no fact essential to maintaining the action. . . . The plea is clearly bad. Consistently with all the facts stated in it the writ of extent may have been sued out by the defendant without any reasonable and probable cause" (*a*). So, it is enough if the proceeding has been abandoned without being brought to a formal end, though this cannot well happen in a criminal prosecution (*b*).

Reasonable and probable cause—a question for the judge.

3. The question of reasonable and probable cause frequently occasions no little embarrassment in the conduct of a trial, not so much from its own inherent difficulty as from the manner in which it presents itself: since, first of all, it involves the proof of a negative, and, secondly, in dealing with it the judge has to take on himself a duty of an exceptional nature. The plaintiff has, in the first place, to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant (*c*). To do this he must show the circumstances under which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appear that those facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted, which is sometimes done by putting in the depositions taken before the magistrate (*d*). Sometimes a case may be made out, whatever the state of facts may be, by means of evidence that the defendant did not believe in the justice of

(*a*) *Per Cur.*, *Craig* v. *Hasell*, (1843) 4 Q. B. p. 492.

(*b*) *Pierce* v. *Street*, (1832) 3 B. & Ad. 397.

(*c*) *Abrath* v. *North Eastern Ry.*, (1886) 11 App. Cas. 247; *Willans* v. *Taylor*, (1829-31) 6 Bing. 183. As to what constitutes reasonable and probable cause for the institution of bankruptcy proceedings, see *Cox* v. *English, Scottish & Australian Bank, Ltd.*, (1905) A. C. 168, P. C.

(*d*) *Walker* v. *South Eastern R. Co.*, (1870) L. R. 5 C. P. 640.

his own prosecution, for if that is so, there is no reasonable and probable cause for *him* (*a*).

Province of jury.

It is, of course, for the judge to say whether there is evidence to go to the jury, and if there is, it is for the defendant then to elect whether he will attempt to impeach, contradict, or supplement it. When all the evidence is before the Court every disputed fact and every disputed inference of fact is for the jury to decide upon, with this exception, that the final inference as to the presence or absence of reasonable and probable cause is to be drawn by the judge alone. He must accordingly make the jury find the facts and draw the subordinate inferences specially, or he must leave the whole case to them with a hypothetical direction that if they take such and such a view of the case there is reasonable and probable cause, and otherwise not. However numerous and complicated the facts may be, one or other of these courses has to be adopted (*b*).

Inferences of law and fact.

The inference of reasonable and probable cause has been sometimes called an inference of law, sometimes an inference of fact, sometimes a mixed inference. In truth, however, the distinction between the two classes of inferences is practical rather than theoretical. An inference which a jury say may be drawn from the premises is an inference of fact; an inference which the judge says must be drawn from the premises according to legal rules is an inference of law (*c*). The trial of an action is a long inductive process. The ultimate premises are the various statements made by the witnesses. From these statements it is inferred that a certain condition of things existed, and that certain things were said and done on the one side and the other, and so the case advances through a series of converging inferences until the final inference is reached that there should be a verdict for the defendant or the plaintiff, as the case may be. If at any stage of a trial certain matters are established, the proper effect of which

(*a*) *Willans* v. *Taylor*, (1829–31) 6 Bing. 183; *Broad* v. *Ham*, (1839) 5 Bing. N. C. 722; *Turner* v. *Ambler*, (1847) 10 Q. B. 252.

(*b*) *Panton* v. *Williams*, (1841) 2 Q. B. 169; *Lister* v. *Perryman*, (1870) L. R. 4 H. L. 521. An able summary of the factors necessary to constitute a *primâ facie* presumption of reasonable and probable cause is furnished by the judgment of the Court of Appeal in *Hicks* v. *Faulkner*, (1882) 46 L. T. 127, C. A.

(*c*) The respective provinces of judge and jury are well defined by the House of Lords in the *Metropolitan R. Co.* v. *Wright*, (1886) 11 App. Cas. 152.

has been judicially considered and determined on previous occasions substantially similar, then it is for the judge to interpose and say what the inference is which authority compels him to draw.

Province of judge.

The peculiarity of the inference of reasonable and probable cause is that it has to be drawn by the judge without any precedent to guide him. The premises which he has to deal with are nearly always materially different from those which he may find recorded elsewhere. He cannot lay down an abstract proposition of law as his major, take the facts found by the jury as his minor, and thence deduce the necessary consequence: he simply has to continue by the light of experience and common sense the inductive process which has hitherto been carried on by the jury. A difficulty, therefore, sometimes arises as to the precise point at which his intervention ought to take place. The jury are to carry the induction up to the stage at which an immediate inference can be drawn as to the presence or absence of reasonable and probable cause. But different minds may take different views as to what an immediate inference is, and some will proceed by one step to a conclusion at which others will only arrive at by degrees. Thus sometimes, if the witnesses are unimpeached in character and do not contradict one another, nothing at all may be left to the jury (*a*); at other times they may have to decide almost in terms the issue itself. In *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (*b*), the question was whether the defendant had reasonable and probable cause for presenting a winding-up petition against the plaintiff company. This depended on whether he had reasonable ground at the time of the petition for supposing himself then a shareholder. He had held some shares which a fortnight previously he had directed his broker to sell, forwarding at the same time a transfer. He had been told by the broker that a sale would be impracticable, but the transfer had not been returned, and in fact the shares were sold. It was held that it was for the jury to say whether under such circumstances he might reasonably consider himself a shareholder, and reasonably therefore present the petition. In most cases probably a judge, who is anxious to leave as much as possible to the jury, can

(*a*) *Davis* v. *Hardy*, (1827) 6 B. & C. 225. (*b*) (1883) 11 Q. B. D. 674.

succeed in suggesting a question for their consideration the answer to which leads so obviously and necessarily to the further inference that it is virtually decisive.

What is reasonable and probable cause.

As has been already seen, reasonable and probable cause depends upon the information and belief of the defendant. "There must be a reasonable cause—such as would operate on the mind of a discreet man; there must be a probable cause—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him: I cannot say that the defendant acted on probable cause, if the state of facts was such as to have no effect on his mind" (*a*). And first as to the defendant's information. It is immaterial on this point to consider what the real facts were unless they were in the knowledge of the defendant at the time of making the charge. Although if there be evidence of wilful and culpable neglect on the part of the defendant to make reasonable use of available information, as to the real state of affairs, such negligence will, apparently, afford some evidence of malice (*b*). In *Delegal* v. *Highley* (*c*), the defendant, in a declaration for malicious prosecution, pleaded specially facts which showed that the plaintiff was in truth guilty of the crime imputed, and it was held that the plea was bad for not alleging that the defendant was aware of those facts. "It is quite consistent with the allegations in this plea, that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made" (*d*). On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts which in themselves appeared a good cause of prosecution.

Knowledge of defendant.

Evidence showing *primâ facie* case.

A man is not bound before instituting proceedings to see that

(*a*) *Per* Tindal, C.J., *Broad* v. *Ham*, (1839) 5 Bing. N. C. p. 725; see, too, *Turner* v. *Ambler*, (1847) 10 Q. B. 252.

(*b*) *Arbrath* v. *North Eastern R. Co.*, (1886) 11 App. Cas. 247.

(*c*) (1837) 3 Bing. N. C. 950.

(*d*) *Per Cur.*, *ibid.*, pp. 959–60. See, however, *Heslop* v. *Chapman*, (1853) 23 L. J. Q. B. 49; see below, p. 665.

he has such evidence as will be legally sufficient to secure a conviction. In *Dawson* v. *Vansandau* (*a*) the defendant had preferred a charge of conspiracy against the plaintiff on the evidence of an alleged accomplice, and it was held that he might well have reasonable and probable cause. "An accomplice or tainted witness may give evidence sufficient to make out a *primâ facie* case and warrant the preferring of a criminal charge, though it might not be sufficient evidence upon which to convict (*b*)."

Evidence not legally admissible.

Neither is it necessary that the defendant should act only on legal evidence and inquire into everything at first hand. It is sufficient if he proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life (*c*); and it is for the plaintiff to satisfy the jury that there was a want of proper care in testing that information (*d*).

Mere suspicion.

It is not, however, justifiable to commence a prosecution on mere suspicion. It is not a reasonable ground for a charge of forgery that the forged document resembles the handwriting of the party accused (*e*), nor is possession of stolen goods a long time after their abstraction a reasonable ground for a charge of larceny (*f*). It has been held that evidence of the plaintiff's bad character has no bearing on the issue of reasonable and probable cause (*g*).

Knowledge of evidence furnishing an answer to the charge.

It may sometimes be contended that a prosecution is unreasonable, not on the ground that the prosecutor had no substantial information before him pointing to the guilt of the plaintiff, but because he was also aware of countervailing evidence which afforded a good answer to the charge. A prosecutor has no right to pick and choose among the evidence before him, and act only upon such portions of it as show that he has good cause for

(*a*) (1863) 11 W. R. 516.

(*b*) *Per Cur.*, *Dawson* v. *Vansandau*, (1863) 11 W. R. at p. 518.

(*c*) *Lister* v. *Perryman*, (1870) L. R. 4 H. L. 521; see *Chatfield* v. *Comerford*, (1866) 4 F. & F. 1008; *Gibson* v. *Veasey*, (1867) 15 L. T. N. S. 586.

(*d*) *Abrath* v. *North Eastern R. Co.*, (1883–6) 11 Q. B. D. 440; 11 App. Cas. 247. See also *Brown* v. *Hawkes*, (1891) 2 Q. B. 718.

(*e*) *Clements* v. *Ohrly*, (1847) 2 C. & K. 686.

(*f*) *Hogg* v. *Ward*, (1858) 3 H. & N. 417. This was a case of wrongful arrest by a policeman. But the question of reasonableness would appear to be the same as in a case of malicious prosecution, although the burden of proof is altered. See, too, *Busst* v. *Gibbons*, (1861) 30 L. J. Ex. 75.

(*g*) *Newsam* v. *Carr*, (1817) 2 Stark. 69.

proceeding; nor on the other hand is he bound to assume that the theory put forward for the defence is sound. "If a man makes a charge before a magistrate, and the accused brings a number of respectable witnesses to prove an *alibi*, is the prosecutor liable to an action if he goes before the grand jury?" (*a*). "Suppose the party has clearly, at the moment, probable cause to believe that a man who robbed him was his servant, but on going home he found him with a broken leg, which had been bandaged for a week, could you say in that case there was probable cause?" (*b*). In *James* v. *Phelps* (*c*) the defendant had indicted the plaintiff for maliciously obstructing an airway in a mine. It appeared that the airway had been obstructed by the plaintiff, but under a claim of right, as the defendant knew, and it was held that there was an absence of reasonable and probable cause.

Lapses of memory and judgment.

A defendant is not necessarily to be considered as unreasonable because he might and ought to have known, had his memory and judgment of particular facts been perfectly accurate and sound, that he had no good ground for proceeding. Memory and judgment may play a man false in a particular instance, though in general he may have good reason for trusting them. If, for instance, he has made a mistake in the identification of stolen property, and in consequence has prosecuted, it will be for the jury to say whether his mistake was an unreasonable one (*d*). In *Hicks* v. *Faulkner* (*e*) the plaintiff had sworn in a County Court action that he had given a certain key to the defendant; the defendant denied this and prosecuted the plaintiff for perjury. It was held that there might be good cause for the prosecution, even assuming the plaintiff to have spoken the truth, provided the defendant had an honest though mistaken trust in his own memory. "If a man has never seen reason to doubt, but on the contrary has ever had reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his

(*a*) *Per* Alderson, B., *Musgrove* v. *Newell*, (1836) 1 M. & W. p. 584; see too *per* Alderson, B., *Heslop* v. *Chapman*, (1853) 23 L. J. Q. B. p. 51.

(*b*) *Per* Lord Abinger, C.B., *Musgrove* v. *Newell*, (1836) 1 M. & W. p. 586; see, too, *Hogg* v. *Ward*, (1858) 3 H. & N. 417.

(*c*) (1840) 11 A. & E. 483.

(*d*) *Douglas* v. *Corbett*, (1856) 6 E. & B. 511.

(*e*) (1878) 8 Q. B. D. 167.

presence within a recent period of time, is it not reasonable to believe in the existence of it?" (*a*).

Mistakes of law.

It has been said that no prosecutor can be made liable in an action simply on the ground that he is mistaken in his law (*b*); the suggestion apparently being that the prosecutor is only answerable for the facts and the tribunal for the law. This, however, seems very questionable. It is true that if a man simply comes before a magistrate and states facts, and the latter thereupon takes a mistaken view, the informant is not responsible for what happens, because in such a case he is not really a prosecutor. But, if he is a prosecutor, he cannot shelter himself under the mistakes of the magistrate (*c*), and his responsibility, indeed, begins before the magistrate has an opportunity of intervening. If A. were to take the goods of B. under circumstances which showed a clear absence of felonious intention, and B., knowing all the facts, were to prosecute him for larceny, it is apprehended that it would be no defence in an action of malicious prosecution for B. to say that he thought any taking was in law a larceny. It is not evidence, however, of absence of reasonable and probable cause that a mistake has been made on a difficult and doubtful question of law (*d*). It has been said that if a prosecutor fairly takes competent legal advice he is in all events justified in acting upon it (*e*). This, however, appears to be extremely doubtful, for if there is no reasonable and probable cause it is difficult to see how the mistaken opinion of a solicitor or counsel can alter the fact. That a man has taken pains to

Acting under legal advice.

(*a*) *Per Cur.*, (1878) 8 Q. B. D. pp. 172–3. It seems going rather far to say that a pure hallucination may give reasonable and probable cause. The case seems inconsistent with *Leete* v. *Hart*, (1868) L. R. 3 C. P. 322, in which it was held that no man can be entitled to suppose he is acting in pursuance of a statute without any facts actually existing to lead to such a supposition. "It cannot be supposed that . . . if a man merely dreamt of a certain state of facts without any ground for his impression and acted on it it would be sufficient" (*per* Keating, J., *ibid.*, p. 325). Now a party may be justified in supposing he is acting in pursuance of a statute on ground which would not be sufficient to constitute reasonable and probable cause for a prosecution: *Chamberlain* v. *King*, (1871) L. R. 6 C. P. 474. The argument, therefore, is *a fortiori*.

(*b*) *Per* Bramwell, B., *Johnson* v. *Emerson*, (1871) L. R. 6 Ex. p. 365.

(*c*) See above, p. 641; *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674.

(*d*) *Phillips* v. *Naylor*, (1859) 4 H. & N. 655.

(*e*) *Per* Bayly, J., *Ravenga* v. *Mackintosh*, (1824) 2 B. & C. p. 697; see, however, *Hewlett* v. *Crutchley*, (1813) 5 Taunt. 277.

form an opinion is no proof that the opinion is sound, though it may tend to show that it is honest, and therefore have a bearing on the issue of malice.

Mixed grounds of prosecution.

If there are sufficient grounds present to a prosecutor's mind for the commencement of proceedings, his defence will not be impaired by the fact that he is acting also on considerations that may be unfounded or absurd. The goodness of some of his reasons will not be affected by the badness of others (*a*).

Absence of belief in justice of prosecution.

No man can be said to have good reason for prosecuting who does not believe in his own case. And if upon the evidence it is apparent to the jury that the defendant, in instituting the proceedings, acted from improper motives, or without honest belief in the substantiality of his own allegations, they are entitled to infer malice (*b*). A prosecutor ought to be convinced, if not of the guilt of the accused, at least of the probability of his guilt. He must entertain the opinion that he has a right to prosecute (*c*). A plaintiff, however, has no right to have the question of the defendant's belief submitted to the jury unless he gives some evidence to show that the latter was not acting *bonâ fide* (*d*). It is obviously difficult in many cases to distinguish the consideration of honesty of belief and honesty of motive, The one is a question of reasonable and probable cause, the other of malice. From lack of honest belief it may be well inferred that there is a lack of honest motive; but it by no means follows that the converse inference may be made. He who believes that there is no ground for a prosecution must be acting from some motive other than a desire to forward the end of justice, but it is perfectly possible that the most malicious motives may co-exist with a genuine belief in the guilt of the accused (*e*). "From the most express malice the want of probable cause cannot be implied" (*f*). In *Heslop* v. *Chapman* (*g*) the defendant had prosecuted the

(*a*) *Hailes* v. *Marks*, (1861) 7 H. & N. 56.

(*b*) *Haddrick* v. *Heslop*, (1848) 12 Q. B. 267.

(*c*) *Hinton* v. *Heather*, (1845) 14 M. & W. 131; *Turner* v. *Ambler*, (1847) 10 Q. B. 252; *Haddrick* v. *Heslop*, (1848) 12 Q. B. 267; *Broad* v. *Ham*, (1839) 5 Bing. N. C. 722. In *Hicks* v. *Faulkner*, (1878) 8 Q. B. D. p. 171, it is laid down that defendant must have believed in the guilt of the accused.

(*d*) *Blachford* v. *Dod*, (1831) 2 B. & Ad. 179.

(*e*) *Turner* v. *Ambler*, *supra*.

(*f*) *Johnstone* v. *Sutton*, (1786) 1 T. R. p. 545.

(*g*) (1853) 23 L. J. Q. B. 49.

plaintiff for perjury. There were facts before him which showed that the plaintiff had wilfully sworn what was false; but in answer to a third party who expressed belief in the plaintiff's innocence he said that he only indicted the plaintiff to close his mouth. It was held that this expression tended to show not only his motive, but also his belief, and therefore was evidence of lack of reasonable and probable cause (*a*). In another case (*b*) the defendant had sent before the grand jury two indictments against the plaintiff for perjury, which were ignored. On a third occasion he himself attended and gave evidence, and the indictment was found. For three years the prosecution was kept suspended on various grounds, and the plaintiff finally took the record down to trial. He was then acquitted, the defendant declining to give evidence. It was decided that, without going into the circumstances of the original charge, it might be inferred from the defendant's conduct that he was conscious that no real case could be established for the prosecution.

Guilt of plaintiff.

It has been said (*c*) that if in an action of malicious prosecution it be found as a fact that the plaintiff was guilty of the offence charged, the absence of reasonable and probable cause is thereby negatived, even though the defendant did not believe him guilty. On the other hand, where the jury found, in effect, that the plaintiff had been guilty of obtaining money by false pretences, but that the defendant at the time when he prosecuted did not believe that the plaintiff had intended to defraud, the judge directed a verdict for the plaintiff (*d*). And this ruling seems more in accordance with the principle that reasonable and probable cause depends, not on the actual facts, but upon the knowledge and belief of the prosecutor (*e*). It is obvious, however, that a plaintiff whom the jury consider really guilty, even if he is entitled to a bare verdict, cannot well be entitled to more.

Divisible charge.

If a man is prosecuted on a charge which is divisible in its nature, as, for instance, if the indictment is for perjury and con-

(*a*) See, too, *Huntley* v. *Simson*, (1857) 2 H. & N. 600.

(*b*) *Willans* v. *Taylor*, (1829–31) 6 Bing. 183. See, too, *Nicholson* v. *Coghill*, (1825) 4 B. & C. 21.

(*c*) *Per* Jervis, C.J., and Pollock, C.B., *Heslop* v. *Chapman*, (1853) 23 L. J. Q. B. p. 52.

(*d*) Wightman, J., *Williams* v. *Banks*, (1859) 1 F. & F. 557.

(*e*) See above, pp. 651–2.

tains several assignments, and he shows absence of reasonable and probable cause for one part of the charge, he is entitled, so far, to succeed, even though it appear that as to the residue reasonable and probable cause existed (*a*).

Malice. Improper motives.

4. "The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives" (*b*). The proper motive for a prosecution is of course, a desire to secure the ends of justice. If a plaintiff satisfies a jury, either negatively that this was not the true motive of the defendant, or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness (*c*); and in considering what is unreasonable they are not bound to take the ruling of the judge. "Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge on this point if it differed from their own—as it possibly might and in some cases probably would—as evidence for their consideration in determining whether there was malice or not" (*d*). The absence of belief in the defendant's mind as to the merits of the case will, no doubt, afford strong proof of malice (*e*); so also any lack of good faith in his proceedings, any indication of a desire to concoct evidence, or procure a conviction *per fas et nefas* (*f*). A plaintiff may sometimes be able to show what the exact motive was, as by proving expressions of spite or ill-will on the defendant's part (*g*); or by showing that he had some collateral object to secure. Thus,

(*a*) *Reed* v. *Taylor*, (1812) 4 Taunt. 616; *Ellis* v. *Abraham*, (1846) 8 Q. B. 709.

(*b*) *Per* Parke, B., *Mitchell* v. *Jenkins*, (1833) 5 B. & Ad. p. 595; so in libel, see above, p. 610.

(*c*) *Mitchell* v. *Jenkins*, (1833) 5 B. & Ad. 588; see *Brown* v. *Hawkes*, (1891) 2 Q. B. 718.

(*d*) *Per Cur.*, *Hicks* v. *Faulkner*, (1878) 8 Q. B. D. p. 175; approved by Brett, M.R., in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. p. 687.

(*e*) *Haddrick* v. *Heslop*, (1848) 12 Q. B. 267.

(*f*) *Heath* v. *Heape*, (1856) 1 H. & N. 478; *Busst* v. *Gibbons*, (1861) 30 L. J. Ex. 75; *Stevens* v. *Midland R. Co.*, (1854) 10 Ex. 352.

(*g*) See *Mitchell* v. *Williams*, (1843) 11 M. & W. 205.

where the defendant had said that by indicting the plaintiff he would close his mouth in another legal proceeding then pending it was held that this was good evidence of malice (*a*). Where a prosecution for larceny had been instituted "in order to deter others from committing similar depredations," this was declared to be "not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution" (*b*). It is open to the defendant, with a view of rebutting malice and showing his good faith, to give in evidence all the facts and circumstances that were present to his mind at the time of instituting the proceedings (*c*).

Malicious proceeding in bankruptcy and liquidation.

An action lies in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company or bankruptcy proceedings against an individual (*d*), although an allegation of special damage is perhaps necessary in such case (*e*). It is clearly a heavy imputation in respect of his calling to say of a trader that he is unable to pay his debts, and the endeavour to have a man declared bankrupt necessarily conveys this imputation in the most public manner possible. But ordinarily, it is conceived, it is not defamatory to impute insolvency to an individual not a trader, since insolvency does not touch him in his calling, and may be rather his misfortune than his fault. It may therefore be doubted whether an action lies for the malicious prosecution of bankruptcy against a non-trader, insomuch as such a prosecution is not productive of any legal damage (*f*). It is necessary in this form of action, as in an ordinary case of malicious prosecution, to show that the proceedings which afford the ground of complaint terminated favourably to the plaintiff (*g*). There must also be an absence of reasonable and probable cause (*h*). It was

(*a*) *Haddrick* v. *Heslop*, (1848) 12 Q. B. 267.

(*b*) *Per* Alderson, B., *Sterens* v. *Midland R. Co.*, (1854) 10 Ex. p. 356.

(*c*) See *Thomas* v. *Russell*, (1854) 9 Ex. 764.

(*d*) *Farley* v. *Danks*, (1855) 4 E. & B. 493; *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674.

(*e*) *Wyatt* v. *Palmer*, (1899) 2 Q. B. 106, C. A.

(*f*) A statement affecting the credit of a solicitor is actionable: *A. B.* v. *C. D.*, (1904) 7 F. 22, Ct. of Sess.

(*g*) *Whitworth* v. *Hall*, (1831) 2 B. & Ad. 695; *Metropolitan Bank* v. *Pooley*, (1885) 10 App. Cas. 210.

(*h*) As to what constitutes reasonable and probable cause, see *Cox* v. *English Scottish & Australian Bank, Ltd.*, (1905 168, A. C. P. C.

at one time doubted (*a*) whether a defendant who had presented a bankruptcy petition could be liable to an action unless he had in some way deceived the Court, because if his affidavits were truthful no injury could be done, unless through the mistake of the Court itself, for which he was not responsible. This view, however, has since been held erroneous, and indeed the presentation of the petition is of itself a good cause of action even though it be immediately dismissed when it comes on for hearing (*b*). There must needs be great injury to a man's credit when it becomes known that a petition is pending against him.

Abuse of civil process.

An action lies for the abuse of ordinary civil process, which differs only from an action for malicious prosecution in that the gist of it seems to be the special damage. Malice and absence of reasonable and probable cause must be proved in the same manner in the one as the other (*c*); it must be proved also that the proceedings came to a due legal end (*d*). It is not, however, an abuse of the process of the Court for a debtor to present a bankruptcy petition with the object of evading the pressure of a judgment summons (*e*). The mere setting of the criminal law in motion may be actionable as necessarily involving an injury to the reputation of the person prosecuted, but in civil proceedings the remedy is only for some damage to person or property, as where a man is maliciously arrested when about to go abroad, and required to give security, or his goods are maliciously taken in execution. Formerly creditors, both before and after judgment, could by a proceeding requiring no judicial intervention of the Court, apprehend the persons of their debtors, and actions for the abuse of this process were very frequent.

Arrest under judge's order.

As the law now stands, a defendant in an action can only be arrested before judgment under a judge's order, upon due proof that the plaintiff has a good cause of action against him for 50*l.*, that he is about to leave the country, and that by so doing he

(*a*) See *Johnson* v. *Emerson*, (1871) L. R. 6 Ex. 329.

(*b*) *Quartz Hill Gold Mining Co.* v. *Eyre*, *supra*, p. 658; but see *Wyatt* v. *Palmer*, *supra*.

(*c*) *Mitchell* v. *Jenkins*, (1833) 5 B. & Ad. 588.

(*d*) *Watkins* v. *Lee*, (1839) 5 M. & W. 270. On this point, see *Wilkinson* v. *Howel*, (1830) M. & M. 495; *Brook* v. *Carpenter*, (1825) 3 Bing. 297; *Pierce* v. *Street*, (1832) 3 B. & Ad. 397; *Norrish* v. *Richards*, (1835) 3 A. & E. 733.

(*e*) *Painter*, *Ex parte*, (1895) 1 Q. B. 85; and see *Archer*, *In re*, *Archer*, *Ex parte*, (1904) 20 T. L. R. 390.

will prejudice the plaintiff's remedy (*a*). After judgment he may be imprisoned for disobedience to an order for payment, made on satisfactory evidence of his having adequate means (*b*). Arrest on civil process must therefore always be a purely judicial act, and it is but seldom that any cause of action can arise in respect of it. In *Daniels* v. *Fielding* (*c*), it was held that a plaintiff who sued in respect of an arrest under a judge's order, could not recover merely on evidence that the defendant had acted maliciously and without reasonable cause, but he must show that the order had been obtained by some fraud on the Court. It may, however, be doubted whether this view of the law would now be accepted. The case of *The Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (*d*) seems to show that in no case can a person who has maliciously and unreasonably set the law in motion absolve himself from the consequences which he invited and brought to pass, by the suggestion that their immediate cause was a mistake on the part of the judge (*e*). If there is good cause for an arrest in other respects, but the amount for which security was required was excessive, the plaintiff must prove that by reason of the undue demand his imprisonment was prolonged or the expense of procuring his discharge was increased (*f*). An action will lie as well for a malicious detention as for a malicious arrest. In *Moore* v. *Guardner* (*g*), the plaintiff had been in custody under an attachment for non-payment of costs. He subsequently paid them to the solicitor on the other side, who, however, refused to give an order to the sheriff for his discharge and compelled him to go to the Court. It was held that the plaintiff could not recover, because the refusal was not alleged to be malicious, but it was not doubted that with such an allegation the defendant might have been liable.

Malicious detention.

Malicious execution.

If a man's goods are seized under a judgment irregularly or fraudulently signed, the proper remedy is to have the judgment

(*a*) 32 & 33 Vict. c. 62, s. 6.

(*b*) 32 & 33 Vict. c. 62, s. 5. As for the power of arrest of the bankruptcy court, see 46 & 47 Vict. c. 52, s. 25.

(*c*) (1846) 16 M. & W. 200.

(*d*) (1883) 11 Q. B. D. 674; see above, p. 659.

(*e*) *Per* Brett, M.R., *ibid.* p. 684.

(*f*) *Jenings* v. *Florence*, (1857) 2 C. B. N. S. 467.

(*g*) (1847) 16 M. & W. 595; see, too, *Crozer* v. *Pilling*, (1825) 4 B. & C. 26.

set aside, and then the seizure can be treated as not made under any legal process whatever, and therefore as a mere trespass (*a*). As already pointed out (*b*), an action does not lie simply because an execution creditor acts out of malicious motives. If, however, part of a judgment debt be paid and the creditor nevertheless maliciously takes out execution for the full amount, in such a case, the judgment being in itself unimpeachable, the remedy is for the unfair use of the power which it confers. "It would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or goods have been taken in execution for a larger sum than remained due upon the judgment, . . . the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress or injure the debtor" (*c*). The same principle would apply if a judgment creditor were to refuse a due tender of the debt and then maliciously sue out an execution (*d*). From the nature of the case the plaintiff in an action of this kind cannot be put to prove the favourable determination of the proceeding of which he complains (*e*).

"Charges and expenses," which are mentioned in *Savill* v. *Roberts* (*f*), as the third head of damage, can only in rare cases afford a substantive ground of action, because in nearly all proceedings not of an exclusively criminal nature there is now power to award costs to a successful defendant, and it would be inconsistent after a court of competent jurisdiction had dealt with this matter to allow the same point to be raised in a separate action. If the proceedings in question have terminated adversely to the complaining party he has no cause of action; if in his favour, the cause of his damage is his failure to obtain Costs.

(*a*) *Brown* v. *Jones*, (1846) 15 M. & W. 191; *Bates* v. *Pilling*, (1826) 6 B. & C. 38; *Riddell* v. *Pakeman*, (1835) 2 C. M. & R. 30; see above, p. 196.

(*b*) See above, p. 19.

(*c*) *Per Cur.*, *Churchill* v. *Siggers*, (1854) 3 E. & B. pp. 937–8.

(*d*) See *Gilding* v. *Eyre*, (1861) 10 C. B. N. S. 592.

(*e*) *Gilding* v. *Eyre*, (1861) *supra*. For other cases of abuse of civil process, see *Redway* v. *McAndrew*, (1873) L. R. 9 Q. B. 74; *The Walter D. Wallet*, (1893) P. 202 (malicious arrest of a ship); *Craig* v. *Hasell*, (1843) 4 Q. B. 481 (malicious issuing of an extent); *Gibbs* v. *Pike*, (1842) 9 M. & W. 351 (maliciously registering a judgment); *Horsley* v. *Style*, (1893) 69 L. T. 222 (registration of a document supposed to be a bill of sale). See, too, *Dimmock* v. *Bowley*, (1857) 26 L. J. C. P. 231; *Munce* v. *Black*, (1858) 7 Ir. C. L. R. 475.

(*f*) (1698) 12 Mod. p. 208.

costs from the Court and not the malicious conduct of his opponent. It is true that litigants are almost invariably put to greater expense than they can recover on taxation from the other side, but such costs not being strictly necessary are not considered as a legal damage (*a*). It may sometimes happen that litigation is pursued in the name of a person who is only nominally plaintiff, and against whom an order for costs is unavailing by reason of his insolvency. A successful defendant cannot under such circumstances bring his action for costs against the person really interested in the absence of malice; his proper course was to obtain security beforehand (*b*). If, however, anyone having no interest in the matter maliciously induces a pauper to bring an unfounded action, on the failure of which the defendant is unable to satisfy his costs owing to the plaintiff's insolvency—a legal damage flows directly from the wrongful conduct of the instigating party which affords a good ground of action (*c*).

Maliciously inducing a pauper to sue.

Malicious prosecution before courts-martial.

No action lies for a malicious prosecution before a court-martial. The civil courts cannot undertake to adjudicate on questions of military discipline, and the aggrieved party must look for his remedy to his official superiors (*d*). It is of course different where a wrongful act is committed without jurisdiction under mere colour of military authority, but in such a case the injured party sues for the act itself and not for the malicious prosecution (*e*).

Malicious proceedings in foreign court.

It would seem that malicious proceedings taken in a foreign Court may be actionable. The plaintiff can only succeed under the same conditions as would apply to an action brought in respect of the misuse of a domestic tribunal (*f*).

Extortion under colour of process.

A legal process, not itself devoid of foundation, may be

(*a*) *Cotterell* v. *Jones*, (1851) 11 C. B. 713; see *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674. See, however, *Bradlaugh* v. *Newdegate*, (1883) 11 Q. B. D. 1, *contra*, and note *Foxall* v. *Barnett*, (1853) 2 El. & Bl. 928, although in this case the damages recovered were subsidiary to the action.

(*b*) *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, (1876) 2 App. Cas. 186. See *Purton* v. *Honnor*, (1798) 1 B. & P. 205; *Sarill* v. *Roberts*, (1698) 12 Mod. 208.

(*c*) *Pechell* v. *Watson*, (1841) 8 M. & W. 691; see *Cotterill* v. *Jones*, *supra*.

(*d*) *Johnstone* v. *Sutton*, (1786) 1 T. R. 548–50.

(*e*) *Warden* v. *Bailey*, (1811) 4 Taunt. 67.

(*f*) *Castrique* v. *Behrens*, (1860–1) 3 E. & E. 709.

maliciously employed for some collateral object of extortion or oppression ; and in such case the injured party may have his right of action, although the proceedings of which he complains may not have been determined in his favour. Thus, in *Grainger* v. *Hill* (*a*), the plaintiff was arrested on a *ca. sa.*, and under the duress of his imprisonment was compelled to give up the possession of certain papers. It was contended that he could not sue in respect of the malicious arrest, because it was not alleged to be without reasonable and probable cause, nor was the determination of the suit shown under which the arrest had taken place. It was held, however, that the objection could not prevail, insomuch as the action was not for the malicious arrest, but for abusing the process of the law to effect an object not within its proper scope.

Vexatious use of process.

It has also been held that a process in itself perfectly well founded and proper may amount to a legal wrong if vexatiously and unnecessarily repeated. In *Heywood* v. *Collinge* (*b*), the defendant caused the plaintiff to be arrested in an action commenced in the Exchequer ; he did not proceed with that action, and the plaintiff was consequently discharged. He then commenced fresh proceedings in the Queen's Bench in respect of the same cause of action, and again arrested the plaintiff. Under these circumstances the Court decided that an action might lie in respect of the second arrest without inquiring into the result of the proceedings. "If an action is not sustainable under such circumstances, we must be prepared to hold that the process of the Court may be abused by a plaintiff for purposes however wanton or malicious. We may suppose the case of a party harassing the defendant under the forms of law by maliciously suing out three writs for the same cause on the same day, and successively arresting the defendant on all three of them. In such a case the principle of the law allows an action, though in form it may have some novelty" (*c*). So in the case of *Waterer* v. *Freeman* (*d*), an action was held to lie against a judgment creditor who, pending an execution, unnecessarily and maliciously seized under a second writ.

(*a*) (1838) 4 Bing. N. C. 212.
(*b*) (1838) 9 A. & E. 268.
(*c*) (1838) *per* Coleridge, J., *ibid.* p. 274.
(*d*) (1617-9) Hob. 205, 266.

Collusive proceedings in fraud of a third party.

A man may suffer damage by legal proceedings not immediately directed against him, and to which he is no party. If such proceedings are not honest, but undertaken with the view of injuring him, the guilty party will not escape his responsibility merely because he succeeded in using a process of the law as the instrument of his fraud and malice. In *Smith* v. *Tonstall* (*a*), the plaintiff, a judgment creditor, alleged that the defendant had conspired with the judgment debtor and had seized and removed the goods of the latter under a sham judgment and execution, whereby the plaintiff had been prevented from obtaining satisfaction of his debt; and it was held that he had a good cause of action. In such a case it is immaterial how the proceedings complained of terminated, because they do not bind the plaintiff and he had no opportunity of intervening (*b*).

Maintenance.

If a mere stranger intervenes in pending litigation on the one side or the other, he is guilty of the offence of maintenance and may make himself liable to the other party for the whole costs, damages, or other consequences of the proceedings in question. "Maintenance is an unlawful upholding of the demandant or plaintiff, tenant or defendant in a cause depending in suit, by word, writing, countenance, or deed" (*c*). It is therefore altogether distinguishable from the malicious instigation of an action. It applies only to litigation actually depending (*d*), it may be devoid of actual or express malice (*e*), and it is equally unlawful whether the party maintained is in the result successful or not, and whether he is plaintiff or defendant. The plea of "charity" if not an absolute defence to this action, is apparently admissible in mitigation of damages (*f*). It is, moreover, perfectly permissible to maintain an action in which a man has or reasonably supposes himself to have an interest. Thus, if the rights of two people stand on a common footing, the one may combine with the other in supporting those rights (*g*).

The common interest which will justify interference in another's

(*a*) (1687) Carthew, 3.

(*b*) Cp. *Castrique* v. *Behrens*, (1860-1) 3 E. & E. 709.

(*c*) 2 Inst. 212.

(*d*) *Flight* v. *Leman*, (1843) 4 Q. B. 883.

(*e*) *Bradlaugh* v. *Newdegate*, (1883) 11 Q. B. D. 1.

(*f*) *M'Carthy* v. *Kennedy* (Times Newspaper, March 8th, 1905).

(*g*) *Findon* v. *Parker*, (1843) 11 M. & W. 675; *Guy* v. *Churchill*, (1888) 40 Ch. D. 481.

suit must be either "an actual valuable interest in the result of the suit itself, either present or contingent or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him or the interest arising from the connection of the parties, *e.g.*, as master and servant, or that which charity and compassion give a man on behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them" (*a*). It has also been held that "support" afforded by a brewer, who was a magistrate, in obtaining a licence for a beerhouse keeper, in consideration of the latter purchasing his beer from the firm of which the brewer was a member is not champertous (*b*), though this decision was apparently arrived at partly on the ground that the granting of a licence is an administrative and not a judicial act.

The doctrine of maintenance does not apply to criminal proceedings (*c*).

(*a*) *Per* Lord Coleridge, C.J., in *Bradlaugh* v. *Newdegate*, (1883) 11 Q. B. D. p. 11; cited with approval in *Alabaster* v. *Harness*, (1895) 1 Q. B. 339; see also *Harris* v. *Briscoe*, (1886) 17 Q. B. D. 504; and *M'Carthy* v. *Kennedy*, *supra*, p. 664.

(*b*) *Savill* v. *Langman*, (1898) 79 L. T. 44, C. A.

(*c*) *Grant* v. *Thompson*, (1895) 72 L. T. 264.

CHAPTER XX.

FRANCHISES.

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Franchise defined.

A FRANCHISE is "a royal privilege or branch of the king's prerogative subsisting in the hands of a subject. . . . It is . . . a franchise for a number of persons to be incorporated and subsist as a body politic. . . . Other franchises are . . . to have waifs, wrecks, estrays, treasure trove (*a*), royal fish, forfeitures, and deodands; . . . to have a fair or market, with the right of taking toll either there or at any other public places, as at bridges, wharfs, and the like . . . or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty" (*b*).

Disturbance of franchise.

"Disturbance of franchises happens when a man has a franchise of holding a court-leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays . . . and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes and is carried out of my liberty; in every case of this kind . . . there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other writ, he is, therefore, entitled to sue for damages by a special action on the case" (*c*).

Many of the franchises mentioned in the above passages are

(*a*) *Attorney-General* v. *Trustees British Museum*, (1903) 2 Ch. 598.

(*b*) Bl. Com., Vol. 1, pp. 37–8.

(*c*) Bl. Com., Vol. 3, pp. 236–7.

practically obsolete. In respect of others the methods of infringement are obvious, and do not require special consideration. It is only necessary to deal here with the franchises of markets, fairs, and ferries.

Markets and fairs.

A franchise of a market consists in the exclusive right to invite a concourse of buyers and sellers, either of goods generally or of particular kinds of goods, at certain appointed times, either to a certain spot marked out by metes and bounds or to some spot to be appointed within the limits of a town or parish. A fair does not appear to differ in its legal incidents from a market (*a*), though the latter is less than the former (*b*). It is in fact simply a special kind of market held yearly or half-yearly. Ancient fairs and markets exist by charter and prescription. In modern times, however, they are usually created by Act of Parliament. By 38 & 39 Vict. c. 55, ss. 166—7, urban authorities have power to establish markets, subject to the provisions of the Markets Clauses Act (*c*).

Right of lord of market.

With regard to markets by grant from the Crown, the right of the lord of the market is to restrain buying and selling which interferes with his monopoly. In certain cases the mere interference is of itself actionable; in others the buying and selling must be, as it is termed, in fraud of the market. But if once the disturbance of an existing market is proved, the absence of fraudulent intention on the part of the defendant is no bar to action (*d*).

Setting up rival market.

It is a clear disturbance of a market to set up a rival emporium, and to invite a concourse of buyers and sellers for the purpose of trafficking in articles of the same kind as those for which the market is held (*e*). An auctioneer who conducts public sales of tollable goods may be guilty of a disturbance, and so may the owner of the premises on which the auction takes place, provided he let them for the purpose (*f*). It has been laid down (*g*) that a rival market held on any day within seven miles of the old

(*a*) 2 Inst. 406.
(*b*) Gunning on Tolls, p. 44.
(*c*) 10 & 11 Vict. c. 14.
(*d*) *Wilcox* v. *Steel*, (1904) 73 L. J. Ch. 217, C. A.
(*e*) *Great Eastern R. Co.* v. *Goldsmid*, (1884) 9 App. Cas. 927.
(*f*) *Mayor of Dorchester* v. *Ensor*, (1869) L. R. 4 Ex. 335.
(*g*) *Yard* v. *Ford*, (1670) 2 Wm. Saund. 172.

market *may* be a disturbance, while if held on the same day as the old market it *must* be a disturbance. This statement of the law was recognised as correct in the opinion given by the judges on the Islington Market Bill (*a*). It has, indeed, been suggested that this rule does not apply at the present day, and the limit of protection to be given must depend upon the public requirements in each particular case (*b*). The suggestion, however, receives no countenance from a recent and authoritative case on the subject (*c*), in which it was held that it is no defence to an action for disturbance by a rival market that the old market provides insufficient accommodation. It makes no difference whether the new market be set up without colour of right or under the authority of a charter from the Crown, for the Crown cannot derogate from the grant already made in respect of the old market (*d*). The fulfilment of a contract made at a market to deliver tollable goods at a future date within the market limits, is not, however, apparently an offence within sec. 13 of the Markets and Fairs Clauses Act, 1847 (*e*). The remedy in the case of insufficient accommodation is to revoke the whole charter if the grantee wilfully neglects to provide for the public need; while if it appears, after due inquiry, that he is unable to do so, the Crown may then lawfully grant a supplementary market (*f*).

Insufficiency of old market.

Under ordinary circumstances it is no disturbance of a market if the neighbouring tradesmen carry on their business in the ordinary way, even though the effect be to diminish the resort of customers to the market (*g*). Apparently, however, a sale of *Tollable* goods, by a person without a hawker's licence, to others than regular customers, from a cart at a distance from the shop of the tradesman to whom the cart belongs, amounts to a disturbance of market (*h*). But where there is an exposure for sale, by a licensed hawker, of *Tollable* goods not requiring a hawker's

Selling in shops.

(*a*) (1835) 3 Cl. & F. 513.

(*b*) *Per Cur.*, *Newton* v. *Cubitt*, (1862) 12 C. B. N. S. p. 60.

(*c*) *Great Eastern R. Co.* v. *Goldsmid*, (1884) 9 App. Cas. 927.

(*d*) *Islington Market Bill*, (1835) 3 Cl. & F. 513.

(*e*) *Gracey* v. *Banbridge Urban Council*, (1905) 2 Ir. R. 209.

(*f*) *Islington Market Bill*, *supra*.

(*g*) *Mayor of Manchester* v. *Lyons*, (1883) 22 Ch. D. 287.

(*h*) *Rose* v. *Taylerson*, (1898) 62 J. P. 181; *O'Dea* v. *Crowhurst*, (1899) 80 L. T. 491; *Woolwich Corporation* v. *Gibson*, (1905) 92 L. T. 538,

licence, although such sale may amount to a disturbance of market, the fact of the vendor being a licensed hawker will nevertheless afford him the protection given by sec. 14 of the Markets and Fairs Clauses Act, 1847 (*a*).

It does not, however, amount to an exposure for sale for a tradesman's messenger to call upon regular customers for orders even if he take the goods with him (*b*).

Certain ancient markets, however, have an absolute monopoly within the limits of the town or parish during market hours, and any sale infringing this monopoly will be an actionable disturbance (*c*). It is apprehended that at the present day such a restriction of the rights of individuals could only be established by an Act of Parliament.

Fraud on market.

No one, however, has a right to bring his goods to a market for the purpose of finding customers and then to refuse payment of the toll which is the consideration for the benefit he receives. To do so is a disturbance of the market, and it makes no difference whether he come within the precincts of the market or not (*d*).

In *Bridgland* v. *Shapter* (*e*) the defendant was in the habit of bringing his goods to a place forty yards outside the limits of the market; he then went within the market in quest of customers, brought them to the spot and there bargained with them. It was held that an action lay against him for disturbance on "the general principle of law that whenever a person seeks to take the benefit of a market without payment of the toll, that is a fraud upon the market" (*f*). In cases of this kind the gist of the action is not the mere selling, but the intention to defraud the lord of his dues. "If a person merely comes to a town to sell a commodity, and it happens to be a market-day there, that would not

(*a*) *Llandudno Urban Council* v. *Hughes*, (1900) 1 Q. B. 472.

(*b*) *Newton-in-Makerfield Urban Council* v. *Lyon*, (1900) 81 L. T. 756.

(*c*) *Mosley* v. *Walker*, (1827) 7 B. & C. 40; *Mayor of Macclesfield* v. *Pedley*, (1833) 4 B. & Ad. 397; *Mayor of Penryn* v. *Best*, (1878) 3 Ex. D. 292. Cp. *Mayor of Macclesfield* v. *Chapman*, (1843) 12 M. & W. 18.

(*d*) The passage above quoted from Bl. Com. treats the refusal to pay toll on goods in the market as a wrong. The ordinary remedy, however, is to sue in contract for the toll as such. See *per* Lord Tenterden, C.J., *Mayor of Newport* v. *Saunders*, (1832) 3 B. & Ad. p. 412.

(*e*) (1839) 5 M. & W. 375.

(*f*) *Per* Lord Abinger, C.B., *ibid.*, p. 382.

be a disturbance of the market, because the act must be done designedly and with an intention to obtain the benefit of the market without payment of toll" (*a*).

If a man brings goods to a market and cannot obtain accommodation there, he has a right to sell them outside without payment of toll. In this case the individual seller stands on a different footing to the person setting up a rival market (*b*). In the recent case of *Newcastle* (*Duke of*) v. *Worksop Urban Council* (*c*), it was held that the fact of a fair and market being held on the same day gave the lord of the fair no right to require an account of enhanced tolls for stallage, charged by the lessees of the market on the particular days when the holding of the annual fair and the weekly market were coincident.

Statutory markets.

Although statutory markets are usually protected against disturbance by special enactments, yet an action for disturbance lies on the same principles as in the case of market by grant from the Crown (*d*). The Markets Clauses Act contemplates "prescribed limits" of protection (*e*). It may therefore be that anything done outside such limits, though within seven miles, would not be a disturbance.

Ferries.

A franchise of a ferry confers the exclusive right of carrying for hire goods and passengers by means of boats (*f*) across a river or arm of the sea from a defined *terminus* on the one side of the water to a defined *terminus* on the other. The right may be to carry forwards and backwards, or one way only (*g*). It seems at one time to have been considered that where an ancient ferry constituted a means of communication between two towns or parishes it might confer a monopoly in the traffic, and that therefore no other person might knowingly ferry anyone journeying between the towns or parishes in question, even though by so

(*a*) *Per* Martin, B., *Mayor of Brecon* v. *Edwards*, (1862) 1 H. & C. p. 63.

(*b*) *Prince* v. *Lewis*, (1826) 5 B. & C. 363; see *Great Eastern R. Co.* v. *Goldsmid*, (1884) 9 App. Cas. 927. And see *Wilcox* v. *Steel*, (1903) 67 J. P. 261.

(*c*) (1902) 2 Ch. 145.

(*d*) *Bridgland* v. *Shapter*, (1839) 5 M. & W. 375; *Mayor of Manchester* v. *Lyons*, (1883) 22 Ch. D. 287.

(*e*) 10 & 11 Vict. c. 14, s. 13. As to the meaning of "prescribed limits," see *Caswell* v. *Cook*, (1862) 11 C. B. N. S. 637.

(*f*) The owner of a ferry cannot substitute a bridge; see *Payne* v. *Partridge*, (1691) 1 Salk. 12.

(*g*) *Pim* v. *Curell*, (1840) 6 M. & W. 234.

doing he afforded a shorter and better line of communication (*a*). This view of the law, however, seems not altogether consistent with the principles laid down in *Newton* v. *Cubitt* (*b*). The plaintiffs were the lessees of a ferry from the Isle of Dogs to Greenwich, which at one time had formed the only means of communication between those places. The defendants had built a pier 1,282 yards from the ferry, and in connection with it had established steam communication to the opposite side of the river, with the view of accommodating the inhabitants of a district recently built over. The plaintiffs alleged that this was a disturbance of their franchise, insomuch as they had a right to ferry everyone going from the Isle of Dogs to Greenwich. But, said the Court, "the nature of the franchise seems to be repugnant to the plaintiffs' claim of a ferry from every part of the isle indiscriminately. A ferry exists in respect of persons using a right of way, where the line of way is across water. . . . The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions whence they come, and whither they go, are irrelevant to the exercise of that right: and the ferryman has no inchoate right in respect of any of them, unless they come to his passage" (*c*). The principles here laid down seem to have been accepted by the Court of Appeal in *Hopkins* v. *Great Northern R. Co.* (*d*), and it follows, apparently, that the franchise is disturbed by a rival ferryman only in those cases where he carries in the line of the old ferry, or where he sets up a new line of passage, not for the purpose of affording better communication to the public, but for the purpose of defrauding the old ferry (*e*).

What is a disturbance.

If a new line of communication is made, part of which is a bridge, and a ferry is thereby interfered with, there is no right of action. It has even been doubted whether it is not lawful to erect a bridge in the very line of the old ferry (*f*).

New line of communication.

The mere fact that the ferryman does not perform his duty

Insufficiency of ferry.

(*a*) See *Huzzey* v. *Field*, (1835) 2 C. M. & R. 432.

(*b*) (1862) 12 C. B. N. S. 32.

(*c*) *Newton* v. *Cubitt*, (1862) 12 C. B. N. S. pp. 57–8.

(*d*) (1877) 2 Q. B. D. 224.

(*e*) *Cowes Urban District Council & East Cowes Urban District Council* v. *Southampton & Isle of Wight Royal Mail Steam Packet Co., Ltd.*, (1905) 2 K. B. 287.

(*f*) *Hopkins* v. *Great Northern R. Co.*, (1877) 2 Q. B. D. 224, at p. 233.

properly by providing fit means of passage, is not in itself an answer to an action for a disturbance (*a*).

Duty of ferryman.

It is the duty of the ferryman to provide sufficient accommodation for the public, and an action lies against him for any special damage caused by a breach of this duty (*b*). He is bound to provide, not merely for the safe ferrying, but for the safe embarking and disembarking of his passengers and their property (*c*). This duty appears to be, not to insure, but merely to use proper care and skill (*d*).

Duty of lord of market.

So the lord of a market is bound to take care that his premises are in a safe condition (*e*), and is bound also, it is apprehended, to provide accommodation for all wishing to attend his market to the extent of the space at his disposal (*f*).

(*a*) *Peter* v. *Kendal*, (1827) 6 B. & C. 703.

(*b*) *Payne* v. *Partridge*, (1691) 1 Salk. 12.

(*c*) *Willoughby* v. *Horridge*, (1852) 12 C. B. 742; but see *Walker* v. *Jackson*, (1842) 10 M. & W. 161.

(*d*) *Willoughby* v. *Horridge*, *supra*.

(*e*) *Lax* v. *Corporation of Darlington*, (1879) 5 Ex. D. 28.

(*f*) *Islington Market Bill*, (1875) 3 Cl. & F. 513.

CHAPTER XXI.

INCORPOREAL PERSONAL PROPERTY.

PART I.—COPYRIGHT.

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Literary and artistic property.

THE producer of an original literary or artistic work—using the terms in their very broadest sense—has, of course, the same right in the manuscript, or other concrete form in which he embodies his thought, as he has in any other of his chattels, but he has besides the right to prevent others from turning to their own use and advantage the invention and labour which he has bestowed thereon. And this right is of two kinds, one existing by the common law until he has published his work to the world at large (*a*), and the other by statute after such publication (*b*).

Literary property at common law.

"The author of a literary composition which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. If he lends a copy to another, his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that

(*a*) See *Exchange Telegraph Co.* v. *Gregory*, (1896) 1 Q. B. 147, where the plaintiffs were held to have a common law right of property in information collected by them as to the prices of various stocks and shares, and communicated by them privately to their subscribers.

(*b*) In dramatic pieces, however, under 3 & 4 Will. IV. c. 15, and works of art under 25 & 26 Vict. c. 68, there seems to be a statutory copyright before publication.

undertaking" (*a*). "If an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incident to personalty. He may make an assignment, either absolute or qualified in any degree. He may lend, let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing he may fix the number of transcripts which he permits. If he prints for private circulation only he has still the same rights" (*b*). Where, however, a newspaper proprietor or editor receives a report of a matter of public interest from a journalist, and, instead of reproducing it *verbatim*, extracts its substance and inserts it in his journal in a new or largely modified form, it has been held that the copyright therein vests in the person who has remodelled the article, and not in the original contributor (*c*).

Letters. The writer of letters, even of a familiar character, whatever may be the nature of his right in respect of the manuscript itself, has so far a literary property that he can restrain the recipient from multiplying and circulating copies, except in so far as the purposes of justice may require (*d*). It is not a sufficient justification of such publication that the recipient thinks it necessary for the purpose of vindicating his character (*e*), though it may be otherwise where he seeks to rebut imputations cast by the writer of the letters (*f*).

Lectures. If a man delivers a lecture or address to a selected number or limited class of persons he does not thereby so far publish his composition as to lose his common law right to restrain its publication by other people (*g*), the understanding between him and his auditors being that they may avail themselves of what they hear for their own benefit, but not reproduce it for the outside public (*h*). So it has been held that the public performance

(*a*) *Per* Parke, B., *Jefferys* v. *Boosey*, (1854) 4 H. L. C. pp. 919–20.

(*b*) *Per* Erle, J., *ibid.* pp. 867–8.

(*c*) *Springfield* v. *Thame*, (1903) 89 L. T. 242.

(*d*) *Gee* v. *Pritchard*, (1818) 2 Swanst. 402.

(*e*) *Ibid.*

(*f*) *Perceval* v. *Phipps*, (1813) 2 V. & B. 19.

(*g*) As to statutory copyright in lectures, see 5 & 6 Will. IV. c. 65, which, however, for all practical purposes seems to add very little to the protection given to the lecturer by the general law.

(*h*) *Abernethy* v. *Hutchinson*, (1824) 1 H. & T. 28; *Nicols* v. *Pitman* (1884) 26 Ch. D. 374; *Caird* v. *Sime*, (1887) 12 App. Cas. 326. In the first of these cases, Lord Eldon doubted whether protection could be given to a mere oral

of a play does not amount to its publication as a literary composition (*a*). On the other hand, a speech, sermon, address, or lecture, may be addressed to the public at large, and its delivery under such circumstances will be a publication depriving the author of any right at common law and leaving him only his statutory copyright. Apparently, however, in the absence of any claim by the lecturer to the copyright of his speech under the Lectures Copyright Act, 1835, the copyright, throughout the British dominions (*b*), in *verbatim* reports of public speeches, vests in the reporter, who, by virtue of his shorthand notes and subsequent transcription, becomes the "author" of the report of such speech within the meaning of ss. 2, 3, 18, of the Copyright Act, 1842 (*c*).

Pictures.

The painter of a picture has a right at common law to restrain people from copying his picture, and he does not lose this right by exhibiting it to the public on the express or implied terms that they are simply to view and not to copy (*d*).

Remedy at common law.

So long as a man keeps his literary or artistic property unpublished to the world at large, any violation of the privacy which he chooses to maintain is a wrong. If, for instance, he has a collection of drawings, not merely may not the drawings themselves be copied, but it is unlawful to publish a descriptive catalogue of them (*e*)

Copyright in books.

Copyright, in the proper sense of the term, means the right which after publication the producer retains to multiply copies. Copyright in books is now regulated (*f*) by 5 & 6 Vict. c. 45, commonly known as Talfourd's Act (*g*). It is property in the strict sense and assignable (*h*).

Duration.

By this Act copyright in every book published in the lifetime

communication, of which no manuscript existed, in the same way as it is accorded to a literary composition, but he did so, apparently, not on any ground of principle, but only because there was a difficulty in discovering the exact form of the spoken words and effecting a fair comparison between them and the alleged piracy.

(*a*) *Macklin* v. *Richardson*, (1770 Amb. 694.

(*b*) 5 & 6 Vict. c. 45, s. 29.

(*c*) *Walter* v. *Lane*, (1900) A. C. 539.

(*d*) *Turner* v. *Robinson*, (1860) 10 Ir. Ch. Rep. 121 and 510.

(*e*) *Prince Albert* v. *Strange*, (1848) 2 De G. & Sm. 652.

(*f*) Except in cases of copyrights belonging to certain universities and colleges, as to which, see 15 Geo. III. c. 53.

(*g*) Repealing 8 Ann. c. 19.

(*h*) s. 25.

of its author is to endure for the natural life of the author and seven years afterwards or for forty-two years, whichever period is the longer, and is to be the property of the author and his assigns: and copyright in books first published after the death of the author is to endure for forty-two years, and is to be the property of the proprietor of the author's manuscript and his assigns (*a*). In the case of contributions to encyclopædias and periodicals the right remains in the proprietor for twenty-eight years, and then reverts to the contributor for the rest of the period. The proprietor has no right of publishing the contributions separately. The writer may reserve to himself the right of separate publication, in which case his right and that of the proprietor will be concurrent (*b*).

What is a book.

The term "book" is defined to include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan published separately (*c*). Engravings which, by reason of the provisions of the Acts relating to copyright in engravings not having been complied with, would be unprotected if published separately, will, nevertheless, be protected under this Act if bound up in a volume, even though the letterpress which they illustrate is not itself the subject of copyright (*d*), and, indeed, even though there be no letterpress at all (*e*). A volume is none the less a book within the Act because it is published only as an advertisement and not for sale (*f*).

Titles of books.

The name of a book is no part of the book itself for the

(*a*) s. 3. S. 17 of the Act of 1842 prohibits the importation into any part of the United Kingdom or its dependencies, for the purpose of sale or hire, of any printed book (copyrighted in the United Kingdom) which may have been reprinted in any country or place outside the British Dominions (*Imperial Book Co., Ltd.* v. *Adam & Chas. Black & The Clarke Co., Ltd.*, (1905) 21 T. L. R. 540, P. C.).

(*b*) s. 18.

(*c*) s. 2. Catalogues and lists of articles for sale are books: *Collis* v. *Cater*, (1898) 78 L. T. 613. But a cardboard pattern of a sleeve, containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions is not within the section: *Hollinrake* v. *Truswell*, (1894) 3 Ch. 420.

(*d*) *Bogue* v. *Houlston*, (1852) 5 De G. & Sm. 267. Electrotype reproductions of fashion plates are "engravings": *Marshall* v. *Bull*, (1901) 85 L. T. 77.

(*e*) *Per* Jessel, M.R., *Maple & Co.* v. *Junior Army & Navy Stores*, (1882) 21 Ch. D. p. 378.

(*f*) *Maple & Co.* v. *Junior Army & Navy Stores*, (1882) 21 Ch. D. 369; and see *Collis* v. *Cater*, *supra*.

purposes of copyright (*a*), and, therefore, practically it cannot be the subject of copyright, for the subject of copyright must be an original work, and a mere name can never be sufficiently original for this purpose (*b*).

Registration. Registration of a book at Stationers' Hall is a condition precedent to a right to sue for infringement of copyright (*c*). There is no time limited within which registration must be made, but there can be no effective registration before publication (*d*). Non-registration only affects the right to sue, it does not affect the copyright (*e*), which vests in the author *ipso facto* immediately upon the publication; therefore non-registration at the time of piracy committed is no defence (*f*).

Publication. What amounts to a publication has nowhere been defined, and the question appears to be one of fact. The cases, however, show that a limited, partial, or conditional publication is not a publication within the meaning of the Act (*g*). It must be made by or on behalf of the author or his assignee. In *Clementi* v. *Walker* (*h*) it was held that a publication made with the permission of the author but not on his behalf, and without any assignment, conferred no right on the author or the person publishing.

Place of publication. The publication must take place within the United Kingdom. The Act does not indeed say so in terms, but the inference is drawn from various provisions in the statute, such, for instance, as the provision that within one month after demand in writing the publisher shall deliver copies to certain libraries in the United Kingdom (*i*), a provision which is inconsistent with the publication being at the Antipodes (*k*). In *Jefferys* v. *Boosey* (*l*), which was decided on the repealed statute of Anne, Lord St. Leonards thought the work must not only be published but also

(*a*) *Dicks* v. *Yates*, (1881) 18 Ch. D. 76; overruling *Weldon* v. *Dicks*, (1878) 10 Ch. D. 247, on this point.

(*b*) *Dicks* v. *Yates*, (1881) 18 Ch. D. 76. As to fraudulent use of a title, see below, p. 715.

(*c*) s. 24. Where a work is published in parts registration of the first number suffices: s. 19. With regard to newspapers, see *Walter* v. *Howe*, (1881) 17 Ch. D. 708; *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association*, (1888-9) 40 Ch. D. 425.

(*d*) *Henderson* v. *Maxwell*, (1876-7) 5 Ch. D. 892.

(*e*) s. 24.

(*f*) See *Johnson* v. *George Newnes, Limited*, (1894) 3 Ch. 663.

(*g*) See above, pp. 673-5.

(*h*) (1824) 2 B. & C. 861.

(*i*) s. 8.

(*k*) *Routledge* v. *Low*, (1868) L. R. 3 H. L. 100.

(*l*) (1854) 4 H. L. C. pp. 983-4.

printed in the United Kingdom, on the ground that there was a presumption that the legislature intended to give employment to British labour and capital. There was nothing more in the language of the former Act to warrant this view than is to be found in the later, but whether the Courts will so decide when the question arises upon the later Act must be regarded as very doubtful. Where copyright exists the area within which protection is given to it extends over the whole British dominions (*a*).

Effect of publication abroad.

It was not at one time clear whether a prior publication outside the United Kingdom would under all circumstances operate to prevent the acquisition of a copyright by a subsequent publication within the kingdom, although it was doubted in *Clementi* v. *Walker* whether the mere fact of external publication necessarily made a work *publici juris* (*b*). However, it was provided by 7 & 8 Vict. c. 12, s. 19, that the author of a book could have no copyright, except under the provisions of that Act, if he first published out of her Majesty's dominions. This left the question open as to the effect of a publication in India or the colonies; but now by 49 & 50 Vict. c. 33, s. 8, the English Copyright Acts are made to apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom. It has, moreover, been decided in the modern case of *Baschet* v. *London Illustrated Standard Co.* (*c*) that the protection afforded by this Act in Great Britain and Ireland extends to foreign as well as to colonial authors or artists, provided the claimant is able to show, to the satisfaction of the Court, that he is entitled to a like protection in the country of origin, the joint effect of s. 2, sub-s. 3, of the International Copyright Act of 1886 and of article 2 of the Berne Convention, 1887, being to provide, in cases where all requisite formalities have been complied with, that "authors of any of the countries of the Union . . . shall enjoy in the other countries for their works . . . the rights which the respective laws . . . grant to natives." (*d*).

Foreign authors.

(*a*) *Routledge* v. *Low supra*, p. 678; and see 5 & 6 Vict. c. 45, s. 29.

(*b*) *Per Cur.*, (1824) 2 B. & C. p. 870.

(*c*) (1900) 1 Ch. 73.

(*d*) On Aug. 1st, 1904, Sweden acceded to the International Copyright Convention, 1886.

Colonial copyright.

In the case of pictures, drawings, photographs, or other works of a cognate character produced in the colonies, the effect of the Imperial Fine Arts Copyright Act, 1862, is to confer on persons resident in the British dominions beyond the seas an absolute copyright in their works throughout the United Kingdom, without giving any reciprocal advantage to the inhabitants of the British Islands. Consequently, while a work of art produced in the colonies is copyright in Great Britain, a work of art produced in these islands may be pirated with impunity in its dependencies (*a*).

Originality.

Little or no originality is required in order to constitute a person an author within the meaning of the Act. A stenographer who reports a speech *verbatim* is the "author" of his report (*b*). Even in works of some literary pretension, it is enough if the author has employed skill and labour in arranging and adapting old material in a new form. Thus, if an opera score be arranged for the pianoforte, the arrangement is an independent composition, of which the arranger and not the original composer is the author (*c*). So a mere compilation may be an independent work. A school book is a presentation in a special form of a certain portion of the common stock of knowledge. It will probably not contain a single new fact or notion, but it may be undoubtedly the subject of copyright (*d*). Consequently the author of a subsequent work on the same subject must, in order to protect himself from a charge of piracy, arrange his matter in a sufficiently novel form to prevent his compilation from being a colourable imitation of the one which preceded it (*e*). The law goes still farther, for it protects works in which there is no element of literary skill or arrangement, but to which the author simply contributes the labour of collecting common and undisputed facts. Of this kind of work a directory is a familiar example (*f*). But although the fact that a work is only

(*a*) *Graves* v. *Gorrie*, (1903) A. C. 496.

(*b*) *Ibid.*

(*c*) *Wood* v. *Boosey*, (1868) L. R. 3 Q. B. 223.

(*d*) *Jarrold* v. *Houlston*, (1857) 3 K. & J. 708.

(*e*) *Moffatt & Paige* v. *Gill*, (1902) 86 L. T. 465, A. C.

(*f*) *Kelly* v. *Morris*, (1866) L. R. 1 Eq. 697; *Lamb* v. *Evans*, (1893) 1 Ch. 218; *Exchange Telegraph Co.* v. *Gregory & Co.*, (1896) 1 Q. B. p. 157. But a work of this kind will not be considered original unless a substantial amount of independent labour has been expended

in a very small degree original will not serve to deprive it of copyright, it will be very material when it comes to be inquired what is an infringement. The copyright protects not the whole of the work but only its original element (*a*).

No copyright in piracy.

When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used. There can, it is apprehended, be no right to protection for that which is itself a piracy. An arrangement of an opera score for the piano may be an original work if at the time there is no copyright in the opera itself, but otherwise not (*b*). It has also been held that a mechanical apparatus for producing musical sounds by the passage of air through perforations in a roll of cardboard, inasmuch as it is not an actual reproduction in tangible form of the notes on a sheet of music, does not constitute an infringement of copyright, although the effect may be a colourable reproduction of the original melody (*c*).

The Musical Copyright Act, 1902 (*d*), enables a Court of Summary Jurisdiction to order the seizure and (subsequently to the service of a summons upon the person from whom they were seized) (*e*) the destruction or delivery up to the copyright owner of pirated copies of musical works. Apparently such order for seizure *must* be issued although the pirated works are being sold in a private house, and the order does not confer on the constable the authority of a search warrant (*f*.)

No copyright where publication criminal or fraudulent.

The law will not protect the right of an author in respect of a publication which is itself an offence against the public, as being of an indecent or immoral nature (*g*). If a man is indictable for selling a book he can have no cause of action against another for doing something which may interfere with such sale. *Ex turpi*

upon it: *Leslie* v. *Young & Sons*, (1894) A. C. 335; *Chilton* v. *Progress Printing, &c., Co.*, (1895) 2 Ch. 28; and see *Kelly's Directories* v. *Gavin*, (1902) 1 Ch. 631, C. A.

(*a*) See below, pp. 682–4.

(*b*) *Per* Kelly, C. B., *Wood* v. *Boosey*, (1868) L. R. 3 Q. B. p. 230. See *D'Almaine* v. *Boosey*, (1835) 1 Y. & C. (Ex.) 288.

(*c*) *Boosey* v. *Whight*, (1900) 1 Ch. 122, C. A.; and see S. C. as to rule relating to pirated "expression marks."

(*d*) 2 Edw. VII. c. 15.

(*e*) *Francis, Ex parte*, (1903) 1 K. B. 275.

(*f*) *Ibid.*, 88 L. T. 806.

(*g*) *Stockdale* v. *Onwhyn*, (1826) 5 B. & C. 173; and see *Bachet* v. *London Illustrated Standard Co.*, (1900) 1 Ch. 73.

causâ non oritur actio. This maxim has been applied also where the author is guilty of a fraud upon the public, and seeks to acquire a circulation by passing his work off under false colours (*a*).

What is copyright.

Copyright is defined by 5 & 6 Vict. c. 45, s. 2, as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." By s. 15 it is provided that "if any person shall, in any part of the British dominions, . . . print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea (*b*), or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright" (*c*). It is to be observed that the remedy here given is not co-extensive with the right. Copies may be made otherwise than by printing and for other purposes than sale or hire. If so, the sole right of multiplying copies is infringed, and according to the general principles of the law, apart from the statute, an action lies for the infringement (*d*).

Action by statute.

Action by common law.

Limitation.

The period of limitation in all actions for breach of copyright is twelve months (*e*). The Public Authorities Protection Act, 1893, repeals s. 26 of the Copyright Act, 1842, in so far as it applies to persons acting in the execution of statutory or other public duties. Consequently in such cases the period of limitation is now six months.

Reciting or acting not piracy, unless copies made.

It is not piracy to recite or give public readings from a work

(*a*) *Wright* v. *Tallis*, (1845) 1 C. B. 893.

(*b*) See *Cooper* v. *Whittingham*, (1880) 15 Ch. D. 501.

(*c*) The piratical copies also become the property of the owner of the copyright: s. 23; and see *Muddock* v. *Blackwood*, (1898) 1 Ch. 58.

(*d*) *Novello* v. *Sudlow*, (1852) 12 C. B. 177; *Agar* v. *Peninsular, &c., Co.*, (1884) 26 Ch. D. 637; *Warne & Co.* v. *Seebohm*, (1888) 39 Ch. D. 73.

(*e*) s. 26.

which is the subject of copyright, nor is it piracy to perform a dramatised version of such a work, for in none of these cases is there a multiplication of copies (*a*). But although the mere performance of a dramatised version of a novel, however extensive the plagiarism, is not a legal wrong to the author of the novel, yet if for the use of the performers and other purposes connected with the production of the play it is copied and distributed in manuscript, this is a multiplication of copies which infringes the right of the novelist (*b*). There is therefore an almost insuperable practical difficulty in the way of playwrights who desire to appropriate to their own benefit the invention of authors of fiction.

Plagiarism.

A writer is guilty of piracy when he transfers bodily into his own pages the whole or part of the work of another man, or when without actual transcription he makes an illegitimate use of the substance of such work.

Animus furandi.

It is sometimes said that the essential mark of piracy is the intention to steal (*c*), but such expressions must not be taken as laying down a general rule. A piracy is a piracy, just as a trespass is a trespass, apart from any question of the wrong-doer's intention (*d*). A man may pirate a work of the very existence of which he is unaware (*e*). But every writer is entitled to use previous literature within legitimate limits, and in considering whether these limits have been transgressed the object and intention of the writer are a fit subject of inquiry. This is particularly so where it is complained that a work is pirated by the publication of extracts from it. It is clearly permissible for the purpose of legitimate criticism to publish specimens of a work, with a view to showing its scope and character. So, it is no impeachment of the originality of a work if a writer makes citations for the purpose of illustrating or enforcing the propositions of his text. But it is illegitimate to publish extracts in such a manner that

Extracts.

(*a*) *Reade* v. *Conquest*, (1861) 9 C. B. N. S. 755; *per* Page-Wood, V.-C., *Tinsley* v. *Lacy*, (1863) 1 H. & M. p. 751.

(*b*) *Warne* v. *Seebohm*, (1888) 39 Ch. D. 73.

(*c*) *Per* Lord Ellenborough, C.J., *Cary* v. *Kearsley*, (1803) 4 Esp. p. 170; *per* Page-Wood, V.-C., *Jarrold* v. *Houlston*, (1857) 3 K. & J. p. 716.

(*d*) *Lee* v. *Simpson*, (1847) 3 C. B. 871.

(*e*) *Reade* v. *Conquest*, (1861) 11 C. B. N. S. 479.

the publication may serve some readers instead of the original work, and therefore compete with it in the market (*a*).

Theories and speculations, however original they may be, are not the subject of copyright. When once propounded they are regarded as additions to the common stock of science or learning, and any one who pleases may restate them in his own way (*b*). But it is different with matters of pure literary invention. It is not lawful, for instance, to borrow wholesale the plot, incidents, and language of a novel, and use them as materials for a play which is afterwards printed and published (*c*).

Theories and speculations.

Literary invention.

The most difficult questions with regard to piracy arise where neither the work of the plaintiff nor the work of the defendant is in the strict sense original, but both profess to be based on materials which are common property. In such cases the plagiarism may be committed in two ways. The method and arrangement of the second book may be borrowed from the first, or the matter contained in the second may not be the result of independent knowledge, but merely a reproduction of the first. A writer may resort to a predecessor on the same subject, as a guide to the original authorities, but he has no right to give second-hand quotations and results—at any rate under the guise of an independent examination (*d*). In all cases, where substantial similarities between two works are found, the question is whether the coincidences are due to the one being derived from the other, or to their both being derived from a common source (*e*).

Fair use of common materials.

The same principle is applied in the case of such compilations as directories and the like, in which the sole element of originality is the labour. The compiler may use the publication of his predecessor in order to guide him to the sources of information, but he must not copy. He may take the names and addresses and give them to his canvassers that they may go and make independent

Directories.

(*a*) As to the limits of permissible use of extracts, see *Roworth* v. *Wilkes*, (1807) 1 Camp. 94; *Sweet* v. *Cater*, (1841) 11 Sim. 572; *Campbell* v. *Scott*, (1842) 11 Sim. 31; *Scott* v. *Stanford*, (1867) L. R. 3 Eq. 718; *Bradbury* v. *Hotten*, (1872) L. R. 8 Ex. 1.

(*b*) *Pike* v. *Nicholas*, (1869) L. R. 5 Ch. 251.

(*c*) *Tinsley* v. *Lacy*, (1863) 1 H. & M. 747.

(*d*) *Pike* v. *Nicholas*, (1869) L. R. 5 Ch. 251.

(*e*) *Jarrold* v. *Houlston*, (1857) 3 K. & J. 708; and cp. *Jarrold* v. *Heywood*, (1870) 18 W. R. 279.

inquiry, but he may not use the entries as a whole and simply get them verified (*a*).

Abridgments.

It is laid down in the older authorities that a genuine abridgment—a reproduction in a condensed form of the sense of an original work and not a mere stringing together of extracts—is no piracy (*b*). It is difficult to see the consistency of this view with the general principles of the law on the point. It is said that a good abridgment may be a benefit to the public and, in a sense, an original book. It has, however, already been pointed out that a book, which may be original where the author uses materials which are common to all the world, may be a piracy if he use materials protected by copyright. In *Dickens* v. *Lee*, Knight-Bruce, V.C., says, "I am not aware that one man has a right to abridge the works of another" (*c*).

Amount of borrowing.

It is impossible to lay down any rule as to the extent of borrowing which is required to constitute a piracy. "When it comes to a question of quantity it must be very vague. One writer might take all the vital parts of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to" (*d*). A defendant may rely on the smallness of the use he has made of the plaintiff's book as showing he has done nothing unfair or improper at all, as, for instance, where he has not exceeded the limits of permissible quotations; but still, even it be held that the defendant has been guilty of plagiarism, the smallness of the theft will be a good reason for refusing an injunction, and will justify a verdict for the defendant. In order to constitute a piracy it should be shown that a material and substantial part of the plaintiff's work has been taken (*e*).

Respective rights of author and publisher.

Considerable controversy frequently exists between authors and publishers as to their respective rights in relation to the reproduction of original matter

(*a*) *Morris* v. *Wright*, (1870) L. R. 5 Ch. 279; explaining *Kelly* v. *Morris*, (1866) L. R. 1 Eq. 697, and *Morris* v. *Ashbee*, (1868) L. R. 7 Eq. 34.

(*b*) Lofft, 775; *Bell* v. *Walker*, (1785) 1 Bro. C. C. 451; *per* Lord Hardwicke, *Gyles* v. *Wilcox*, (1740) 2 Atk. p. 143.

(*c*) (1844) 8 Jur. p. 184. See too *per* Page-Wood, V.-C., *Tinsley* v. *Lacy*, (1863) 1 H. & M. p. 754.

(*d*) *Per* Lord Cottenham, *Bramwell* v *Halcomb*, (1836) 3 My. & Cr. p. 738.

(*e*) *Pike* v. *Nicolas*, (1869) L. R. 5 Ch. 251; *Bradbury* v. *Hotten*, (1872) L. R. 8 Ex. 1; *Chatterton* v. *Cave*, (1875–8) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

in a second edition or in a varied form. In the case of contributions to encyclopædias, statistical works, and other compilations of a similar character (apart from express contract) the copyright vests in the publisher and not in the author, whether the former has paid the latter, in compliance with a written agreement, a lump sum down, or a fixed rate per page or per thousand words. Consequently any subsequent reproduction by the author without the publisher's consent will apparently render him liable to an injunction and damages at the suit of the publisher (*a*). A rule the converse of this as regards damages, though apparently not as regards an injunction, applies in cases where there is a subsisting agreement, either by parol or in writing, between author and publisher, in relation to the editing of a classical work (*b*). Moreover an agreement between an author and a publisher to share profits is a purely personal one, and is not assignable. Consequently upon the bankruptcy of the publisher his rights do not pass to his trustee so as to entitle him to reprint and publish a new edition (*c*). Where an author successfully establishes his claim to an injunction, he is also entitled to demand the delivery up of any infringing copies still in the publisher's possession, and to an account of the actual proceeds of the copies sold (*d*).

Musical and dramatic works.

The interest which the author of a musical or dramatic composition has in his work is of a twofold nature. There is, first, the right of multiplying copies—the literary copyright, and, secondly, the more important right of performance and representation. This latter right was first recognised by 3 and 4 Will. IV. c. 15.

Stage-right.

This Act provided that the authors (*e*) of dramatic pieces (*f*) and their assignees should have the sole liberty of representing, or causing to be represented, their works in any place of dramatic entertainment, in case of works not printed or published, for an indefinite period (*g*), in case of works printed and published, for

(*a*) *Lawrence & Bullen* v. *Aflalo & Cook*, (1904) A. C. 17, H. L.

(*b*) *Gollancz* v. *Dent*, (1903) 88 L. T. 358.

(*c*) *Lucas* v. *Moncrieff*, (1905) 21 T. L. R. 683.

(*d*) *Muddock* v. *Blackwood*, (1898) 1 Ch. 58.

(*e*) As to what constitutes an author, see *Shepherd* v. *Conquest*, (1856) 17 C. B. 427; *Hatton* v. *Keen*, (1859) 7 C. B. N. S. 268; *Levy* v. *Rutley*, (1871) L. R. 6 C. P. 523.

(*f*) See *Lee* v. *Simpson*, (1847) 3 C. B. 871.

(*g*) This provision does not seem to

twenty-eight years from the date of such publication or the author's life, whichever period should be longest. The remedy given for the infringement of this right was that for each representation of the whole or part of the work in question the proprietor might recover, at his option, either a penalty of forty shillings, or the injury or loss sustained by him, or the full amount of the benefit or advantage gained by the defendant.

Limitation of action.

The period of limitation for bringing such action is twelve months (*a*).

Performing right in music.

By 5 & 6 Vict. c. 45, s. 20, the period of stage-right in dramatic pieces is extended to the full term allowed for literary copyright, dating from their first public representation; and all the rights given in respect of such pieces are extended to all musical compositions.

Registration.

It is further provided by the same section that the provisions of the Act with respect to registration shall apply to such compositions (*b*); but the effect of a subsequent section (*c*) is that registration is not a condition precedent to the bringing of an action under 3 & 4 Will. IV. c. 15.

Notice of reservation of performing right.

By 45 & 46 Vict. c. 40, provisions are made for printing on the title-page of every published copy of musical compositions, the right of publicly (*d*) representing or performing which it is desired to retain, a notice to the effect that the right of public representation or performance is reserved. The Act, however, does not define what effect non-compliance with these provisions has upon the right of action for infringement.

Damages for infringement of right.

By 51 & 52 Vict. c. 17, s. 1, it is provided that, in actions for the unauthorised representation or performance of any musical composition, only such damages shall be given as the tribunal thinks reasonable. The option of the plaintiff to sue for the forty shillings penalty is taken away.

Double right in dramatic and musical works.

The effect of 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, is to add to the author's right already existing at common law. See above, p. 673.

(*a*) s. 3.

(*b*) As to the effect of an incorrect entry, in the register at Stationers' Hall, with regard to the place and date of the first representation, see *Hardacre* v. *Armstrong*, (1905) 21 T. L. R. 189.

(*c*) s. 24; *Russell* v. *Smith*, (1848) 12 Q. B. 217.

(*d*) It is to be observed that there is nothing either in 3 & 4 Will. IV. c 15, or 5 & 6 Vict. c. 45, about the publicity of the performance; see below, pp. 687 *sqq*.

create a double right, one of multiplying copies, one of representation, which being perfectly distinct, may begin and end at different times, and by assignment may become vested in different persons (*a*). If the author of a dramatic piece or musical composition publishes it as a book before he represents it, he does not thereby deprive himself of the power of subsequently acquiring a stage-right by giving a public representation (*b*).

Effect of first representation abroad.

The statute 5 & 6 Vict. c. 45 does not say where the first publication is to take place, but by 7 & 8 Vict. c. 12, s. 19, it is provided (*inter alia*) that no exclusive right of representation shall be given except under the provisions of that Act, where the first publication has taken place out of her Majesty's dominions. Publication in this section appears to mean that kind of publication which affects the particular right in question. Therefore, a first representation in a foreign country will prevent an author acquiring a stage-right in this country except under the terms of 7 & 8 Vict. c. 12 (*c*), while a printing and publishing, it is apprehended, will not.

Infringement of stage-right and musical right.

The stage-right in dramatic pieces is confined to representations and performances in places of dramatic entertainment, but the corresponding right given by 5 & 6 Vict. c. 45, s. 20, in respect of musical compositions is not subject to any such limitation (*d*). It has therefore been said that a larger protection is given to musical than to dramatic works (*e*). Whether for practical purposes this is so is a question not altogether easy to determine. In *Wall* v. *Taylor* (*f*) the defendant had sung a song, in which the plaintiff had the performing right, at a public

Degree of publicity.

(*a*) 5 & 6 Vict. c. 45, s. 22. See *per* North, J., *Chappell* v. *Boosey*, (1882) 21 Ch. D. p. 239.

(*b*) *Chappell* v. *Boosey*, (1882) 21 Ch. D. 232. If an author publishes his dramatic or musical work as a book and, before he puts it upon the stage, some one else publicly represents it, there is, it is apprehended, nothing in the statutes to make such representation wrongful, since the provision in Lytton Bulwer's Act, dating the copyright from the printing and publishing, is impliedly repealed by Talfourd's Act, dating it from the first public representation. Such representation by a stranger would not serve to give the stage-right to the author (*Clementi* v. *Walker*, (1824) 2 B. & C. 861), but apparently it would not prevent him acquiring the right by a subsequent representation, unless by his acquiescence he made the piece *publici juris*.

(*c*) *Boucicault* v. *Chatterton*, (1877) 5 Ch. D. 267.

(*d*) *Wall* v. *Taylor*, (1882) 9 Q. B. D. 727; 11 Q, B. D. 102.

(*e*) *Per* Shadwell, V.-C., *Russell* v. *Smith*, (1846) 15 Sim. p. 182.

(*f*) (1882) 9 Q. B. D. 727; 11 Q. B. D. 102.

concert in a public hall. It was contended that he was not liable, because the hall was not a place of dramatic entertainment, but this contention was overruled. The performance was clearly public, but some of the *dicta* in the case seem to point to the conclusion that under certain circumstances a purely private performance may be an infringement of the right (*a*).

In *Duck* v. *Bates* (*b*) the defendant had taken an active part in an amateur performance of a play, the stage-right in which belonged to the plaintiff. The performance took place in a room at a hospital, and the audience consisted of the staff, some friends of the performers, and a theatrical reporter. No charge was made for admission. It was held that the plaintiff had no cause of action. All the judges in the Court of Appeal seem to have considered that there was a "performance" within the meaning of the Act; but the majority (*c*) held that there was no performance in a place of dramatic entertainment, the proceedings having been substantially private. "In order to incur the penalties of the Act the place of dramatic entertainment must be some spot for the occasion appropriated to the dramatic entertainment of a portion of the public; and then the question of fact will arise whether the place has not been so appropriated on any particular occasion: profit is a very important element: the question of numbers is also very important: these are matters to be taken into consideration" (*d*).

The conclusion then would seem to be that when the statute speaks of a performance it means any performance, but that when it speaks of a place of dramatic entertainment it means a place of public dramatic entertainment. It is difficult to see why this should be so. The reason given for holding that the "place" must be more or less public is that the possessor of the stage-right is not injured if his play is acted in a purely private and domestic manner (*e*). Equally it may be said that the possessor of a musical copyright is not injured unless his piece is sung with some degree of publicity. On the whole,

(*a*) See *per* Brett, M.R., *ibid.*, pp. 106–7.

(*b*) (1883–4) 12 Q. B. D. 79: 13 Q. B. D. 843.

(*c*) Brett, M.R., and Bowen, L.J., (Fry, L.J., diss.).

(*d*) *Per* Bowen, L.J., *ibid.* p. at p. 850.

(*e*) See *per* Brett, M.R., *Duck* v. *Bates*, (1884) 13 Q. B. D. at p. 847.

therefore, in spite of the difficulty caused by the words "place of dramatic entertainment," it may be doubted whether there is any difference between musical and dramatic rights in respect of the degree of publicity requisite to constitute an infringement (*a*).

Amount of plagiarism.

Cases where the plaintiff complains of an unfair taking of parts of his composition are dealt with on the principles already pointed out with regard to literary plagiarism (*b*). In 3 & 4 Will. IV. c. 15, s. 2, a right of action is given against those representing a protected production "or any part thereof." These words, however, must receive a reasonable construction, and where the borrowing is of an insignificant character it ought not to be treated as an infringement of the plaintiff's right. There should be a taking of a material and substantial part; and it is a question of fact in each case what is material and substantial (*c*).

Rival dramatic versions of novels.

As has been seen (*d*), it is no infringement of literary copyright to represent a dramatised version of a published novel on the stage. If a stage-right is acquired in one such version another adaptor may lawfully produce a rival version, provided he takes his materials straight from the novel and does not in any way avail himself of the other play. It makes no difference if the first adaptation is the work of the author of the novel (*e*). If, however, an author constructs both a play and a novel out of the same materials, and acquires a stage-right in the one before he publishes the other, no one has a right to use such materials for stage purposes, though he may have taken them from the novel, and in fact be ignorant of the play altogether (*f*).

Causing to be represented.

If a man lets his premises for a musical or dramatic performance, and a piece is represented which infringes a stage-right, he cannot be said to "cause it to be represented," so as to

(*a*) As to private musical performances, see *per* Stephen, J., *Duck* v. *Bates*, (1883) 12 Q. B. D. p. 86; 45 & 46 Vict. c. 40, seems to assume that such performances do not infringe any right.

(*b*) See above, p. 682.

(*c*) *Chatterton* v. *Cave*, (1875–8) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483; *Planché* v. *Braham*, (1837) 4 Bing. N. C. 17.

(*d*) See above, p. 682.

(*e*) *Reade* v. *Conquest*, (1861) 9 C. B. N. S. 755; *Toole* v. *Young*, (1874) L. R. 9 Q. B. 523; *Schlesinger* v. *Bedford*, (1890) 63 L. T. N. S. 762.

(*f*) *Reade* v. *Conquest*, (1861) 11 C. B. N. S. 479; *Schlesinger* v. *Turner*, (1890) 63 L. T. N. S. 764. See *Boosey* v *Fairlie*, (1877) 7 Ch. D. 301.

make him liable to an action, even though he may have had notice of what it was intended to perform. He is not in any fair sense a party to the representation (*a*). But where the defendant, the proprietor of a theatre, let it to a member of his company for the night, together with the use of all the properties and the services of all the staff and company, he was held responsible for an unauthorised representation which took place (*b*).

By 51 & 52 Vict. c. 17, s. 3, it is provided that the proprietors, tenants, and occupiers of places at which unauthorised performances of musical compositions take place shall not incur any liability in consequence, unless they wilfully cause or permit such performances knowing them to be unauthorised.

Copyright in prints.

By 8 Geo. II. c. 13 (amended by 7 Geo. III. c. 38, and 15 & 16 Vict. c. 12, s. 14) the sole right (*c*) and liberty of printing and reprinting is given to those who invent, or design, or execute, and to those who from their own invention and design procure to be executed (*d*), original prints, and also to those who execute or cause to be executed prints from pictures, drawings, models, and sculptures, ancient and modern. An action for a five shillings penalty is given for the invasion of this right, which action must be brought within three months after the discovery of the offence (*e*). However, a subsequent statute (*f*) especially provides a right of action for the making, printing, and importing for sale, publishing, selling, and otherwise disposing of piratical (*g*) copies of protected works (*h*). There is no special term of limitation mentioned in this Act. The copyright is given for twenty-eight years commencing from the first day of publication (*i*), which day

(*a*) *Russell* v. *Briant*, (1849) 8 C. B. 836.

(*b*) *Marsh* v. *Conquest*, (1864) 17 C. B. N. S. 418; cp. *Lyon* v. *Knowles*, (1863–4) 3 B. & S. 556; 5 B. & S. 751. The question, of course, must frequently be one of fact for the jury.

(*c*) This right is assignable: *Thompson* v. *Symonds*, (1792) 5 T. R. 41.

(*d*) See *Stannard* v. *Harrison*, (1871) 24 L. T. N. S. 570.

(*e*) 8 Geo. II. c. 13, s. 4.

(*f*) 17 Geo. III. c. 17. This only deals with engravings made in Great Britain. A similar protection to those made in Ireland is given by 6 & 7 Will. IV. c. 59. The original acts do not deal with locality of production.

(*g*) It is not a piracy under this Act to take or deal with copies from the original plate, however wrongful such conduct may be. The plate itself must be piratical: *Murray* v. *Heath*, (1831) 1 B. & Ad. 804.

(*h*) Ignorance of the piracy is no defence; see *Gambert* v. *Sumner*, (1860) 5 H. & N. 5.

(*i*) 7 Geo. III. c. 38, s. 6. Such publication must take place in the King's dominions; 7 & 8 Vict. c. 12, s. 19; 8 Geo. II. c. 13, s. 1.

is "to be truly engraved with the name of the proprietor of each plate," and printed on every impression. These last words are imperative, and no action lies for the piratical copying of any plate in respect of which they have not been obeyed (*a*). The Fine Arts Copyright Act, 1862 (*b*), further amends existing legislation, and confers additional protection on the owners of copyright in works of art.

Infringement.

Whether one print can fairly be said to be a copy of another is clearly a pure question of fact (*c*). It is a proper direction to the jury to ask them whether the main design of the plaintiff's engraving has been copied, and whether the defendant's engraving is substantially a copy of the plaintiff's (*d*). It matters not what the precise method of reproduction adopted may be (*e*). It is a piracy to photograph an engraving, though photography was not known at the time of the enactment of 8 Geo. II. c. 13 (*f*).

Where design of print not original.

If the design of an engraving is not original, all that is protected is the engraver's skill. Other people have as good a right as he to the use of the invention displayed in the painting or drawing from which he copied. In *Dicks* v. *Brooks* (*g*), the defendant counter-claimed against the plaintiff in respect of a woolwork pattern of the figures in a celebrated picture published by the latter, which was taken apparently not from the original but from the defendant's engraving. It was held that this pattern was not a copy of anything in which the skill or work of the engraver was shown, and therefore not any infringement of the engraver's right.

Copyright in sculpture.

By 54 Geo. III. c. 56, persons who "shall make or cause to be made" new and original sculpture, models, copies, casts, busts, and works in relief, "shall have the sole right and property" in them for fourteen years "from the first putting forth and

(*a*) *Thompson* v. *Symonds*, (1792) 5 T. R. 41; *Newton* v. *Cowie*, (1827) 4 Bing. 234; *Brooks* v. *Cock*, (1835) 3 A. & E. 138; *Graves* v. *Ashford*, (1867) L. R. 2 C. P. 410; *Rock* v. *Lazarus*, (1872) L. R. 15 Eq. 104. As to what is a sufficient engraving of the name, see these cases.

(*b*) 25 & 26 Vict. c. 68; and see *infra*.

(*c*) See on this point; *Hanfstaengl* v. *W. H. Smith & Sons*, (1905) 1 Ch. 519.

(*d*) *Moore* v. *Clarke*, (1842) 9 M. & W. 692. See too *West* v. *Francis*, (1822) 5 B. & Ald. 737.

(*e*) See, however, *Martin* v. *Wright*, (1833) 6 Sim. 297.

(*f*) *Gambart* v. *Ball*, (1863) 14 C. B. N. S. 306; *Graves* v. *Ashford*, (1867) L. R. 2 C. P. 410.

(*g*) (1880) 15 Ch. D. 22. See too *Lucas* v. *Cooke*, (1880) 13 Ch. D. 872.

publishing of the same" (*a*), and for a further term of fourteen years if they so long live (*b*). It is a condition of the right that the date and name of the proprietor is to appear on each work before publication (*c*).

Infringement.

The making, importing, exposing for sale, or otherwise disposing of pirated copies of works within the protection of this Act, affords a cause of action for such damages as a jury shall assess (*d*). It has been held that metal models of cavalry soldiers sold as toys for children, if the anatomy be good, and the modelling show both technical knowledge and artistic skill, are within the protection afforded by this statute (*e*). The action must be brought within six months of the discovery of the wrongful act (*f*).

Copyright in works of art.

By 25 & 26 Vict. c. 68, the sole and exclusive right (*g*) of copying, engraving, reproducing, and multiplying their works is given to the authors (*h*) of original paintings, drawings, and photographs (*i*) wherever made, if they are subjects of the King or resident within his dominions.

In order, apparently, to entitle the owner of the copyright to, at least nominal, damages and, in case of necessity, to an injunction restraining reproduction it is not essential that the pirated copy should be in all respects a *fac simile* of the original work (*k*). It is enough if the copy "comes so near the original as to give every person seeing it the idea created by the original" (*l*).

The right is personal property and assignable. It endures for the author's life (*m*) and seven years afterwards (*n*). It is exceptional among rights of this description in that it does not

(*a*) As to what amounts to a publishing, see *Turner* v. *Robinson*, (1860) 10 Ir. Ch. Rep. 121 and 510. As to publishing outside the Queen's dominions, see 7 & 8 Vict. c. 12, s. 19.

(*b*) s. 6. As for assignment, see ss. 4, 6.

(*c*) s. 1.

(*d*) s. 3.

(*e*) *Britain* v. *Hanks*, (1902) 86 L. T. 765.

(*f*) s. 5.

(*g*) There may be an implied contract, as between artist and his sitter, that this right shall not be exercised: *Pollard* v. *Photographic Co.*, (1888) 40 Ch. D. 345.

(*h*) A person who merely conceives a design which he procures another person to draw for him is not the author of the drawing: *Kenrick* v. *Lawrence*, (1890) 25 Q. B. D. 99.

(*i*) A photograph of a picture may be "original": *Graves's case*, (1869) L. R. 4 Q. B. 715.

(*k*) *Hanfstaengl* v. *W. H. Smith & Sons*, (1905) 1 Ch. 519.

(*l*) *West* v. *Francis*, (1822) 24 R. R. 541; 1 D. & R. 400.

(*m*) s. 3. There may be an assignment of a right to take copies of a certain kind only: *Lucas* v. *Cooke*, (1880) 13 Ch. D. 872. As to the effect of a sale of the work itself on the right, see s. 1.

(*n*) s. 1.

depend upon publication (*a*), but exists apparently from the production of the work. However, no remedy is given under the Act for any infringement of the right until registration, with all the particulars (*b*) required by the Act, has been duly made (*c*).

Photographs.

At one time the law was indeterminate as to the exact reciprocal rights of photographer and customer in a portrait produced by the former in return for payment by the latter. It has, however, been decided in the modern case of *Boucas* v. *Cooke* (*d*) that the copyright in a photograph vests in the customer (although, apart from special contract, the negative belongs to the photographer), the work being "made or executed for or on behalf of" another "person for a good or valuable consideration" within the meaning of s. 1 of the Fine Arts Copyright Act, 1862. The effect of this decision is to preclude the photographer from printing, exposing to view, or selling any portrait against the wish of the customer (*e*).

Infringement.

Any one who without the consent of the proprietors of the copyright, either by himself or through the agency of others, repeats, copies, colourably imitates, or otherwise multiplies for sale, hire, exhibition or distribution, protected works, or imports, sells, publishes, lets, exhibits, or distributes, or offers for sale, hire, exhibition or distribution, repetitions, copies or imitations of such works or their designs, is liable to an action for damages, and also for the recovery of the piratical copies (*f*). It has been held under s. 6 of this statute that the printing, issuing, and circulation of each unauthorised copy constitutes a separate offence (*g*).

A copy of a copy may be an infringement of the copyright in the original, as, for instance, where a photograph is taken of an engraving of a picture (*h*).

(*a*) But if there is publication abroad 7 & 8 Vict. c. 12, s. 19, applies; see s. 12.

(*b*) See *Ex parte Beal*, (1868) L. R. 3 Q. B. 387. It is sufficient if an assignment be registered though the original copyright be not: *Graves's case*, (1869) L. R. 4 Q. B. 715.

(*c*) s. 4. See *Tuck & Son* v. *Priester*, (1887) 19 Q. B. D. 629.

(*d*) (1903) 2 K. B. 227, C. A.

(*e*) And see *McCosh* v. *Crow*, (1903) 5 F. 670, Ct. of Sess.: as to who is the "author" of a photograph, see *Nottage* v. *Jackson*, (1883) 11 Q. B. D. 627.

(*f*) s. 11. This is in addition to proceedings for penalties under ss. 7, 8. The penalties are mainly directed against breaches of the Act fraudulently or knowingly committed.

(*g*) *Hildesheimer* v. *Faulkner*, (1901) 2 Ch. 552.

(*h*) *Ex parte Beal*, (1868) L. R. 3 Q. B. 387; *Hanfstaengl* v. *Empire Palace*, (1894) 3 Ch. p. 127; *Hanfstaengl* v. *Baines & Co.*, (1895) A. C. p. 24.

It is expressly provided that nothing in the Act shall prejudice the right to copy or use any work in which there shall be no copyright, or to represent any scene or object notwithstanding that there may be copyright in some representation of such scene or object (*a*). This enactment is in accordance with the general principle of copyright law that there can be no appropriation of materials and subjects common to all the world. It would, it is apprehended, be a piracy for a photographer to arrange a group after a picture, and then to touch up and colour his photograph so as to resemble the picture (*b*). But the representation of a picture by means of a *tableau vivant* is not an infringement of the copyright in the picture (*c*).

Foreign copyright.

By 7 & 8 Vict. c. 12, her Majesty in council was empowered to make orders that authors of books, sculpture, prints, and works of art, first published in a foreign country named in the order (*d*), may have copyright in them for periods defined in the order, not exceeding the terms for which they would have had copyright in them if they had been first published in this country (*e*); she is also empowered to make similar orders as to the right of performance of musical and dramatic compositions (*f*). By s. 19 no author of any work first published abroad is to have any copyright or right of representation or performance except in so far as he may be entitled under this Act.

By 49 & 50 Vict. c. 33, s. 4, when an order respecting a foreign country is made under the International Copyright Acts the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to the works produced in such country except so far as is provided by the order (*g*); and by s. 6 an author or publisher of a work produced before the date of the order is entitled to the same rights and remedies as he would

(*a*) s. 2.

(*b*) See *Turner* v. *Robinson*, (1860) 10 Ir. Ch. Rep. 121. This case was decided upon the general law before the Act. See also *Lucas* v. *Cook*, (1880) 13 Ch. D. 872.

(*c*) *Hanfstaengl* v. *Empire Palace*, (1894) 2 Ch. 1.

(*d*) The order must state that such country gives reciprocal protection: s. 14.

(*e*) s. 2. Such an order shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced: 49 & 50 Vict. c. 33, s. 3.

(*f*) s 5.

(*g*) Where the order contains no provisions as to the registry no registration is required: *Hanfstaengl* v. *American Tobacco Co.*, (1895) 1 Q. B. 347.

have had if it had existed at the time of the production, provided that nothing in the section is to diminish or prejudice any rights or interest arising from or in connection with the production which are subsisting and valuable at the date of the order (*a*).

The general scope of the International Copyright Acts, 1844—1886, is to give in respect of works first published abroad protection in this country, subject to limitations and conditions similar to those which attach to the acquisition of the various kinds of copyright or stage-right in the case of works first published in this country (*b*). Thus, the proprietor of a foreign print, if he wishes to obtain copyright in this country, must comply with 8 Geo. II. c. 13, and engrave and print the date of publication and the name of the proprietor (*c*).

Translations.

It was expressly provided by 7 & 8 Vict. c. 12, s. 18, that nothing in that statute should operate to prevent the production of translations of books protected under it. But with regard to works published in France this exception was modified by 15 & 16 Vict. c. 12, and with regard to works first produced in a country to which an order in council under the International Copyright Acts applies by 49 & 50 Vict. c. 33, s. 5.

Copyright in designs.

By 46 & 47 Vict. c. 57, s. 47, the proprietors (*d*) of new and original (*e*) designs (*f*) for manufacturing purposes not previously published (*g*) in the United Kingdom may register them under the provision of the Act and thereby acquire a copyright in the design for five years from registration (*h*), that is to say, an exclusive right to apply it to the article for which it is registered (*i*). The proprietor must take due care to mark the design on every article in respect of which it is registered, before delivery on sale,

(*a*) As to what constitutes a subsisting and valuable interest, see *Moul* v. *Groenings*, (1891) 2 Q. B. 443; *Schauer* v. *J. C. & J. Field, Ltd.*, (1893) 1 Ch. 35.

(*b*) See ss. 4, 5, 6.

(*c*) *Avanzo* v. *Mudie*, (1854) 10 Ex. 203; see too *Cassell* v. *Stiff*, (1856) 2 K. & J. 279.

(*d*) Defined by s. 61.

(*e*) As to originality, see *Le May* v. *Welch*, (1884) 28 Ch. D. 24; *Saunders* v. *Wiel*, (1893) 1 Q. B. 470.

(*f*) Defined by s. 60.

(*g*) There is an exception as regards exhibition: s. 57.

(*h*) s. 50.

(*i*) s. 60. A design already on the register may be registered in another class for an article used for another purpose, but not for an article used for the same purpose but made of a different material; *In re Bach's Design*, (1889) 42 Ch. D. 661.

or he loses his right (*a*). If the design is used abroad and not used in this country within six months of registration, in this case also the copyright ceases (*b*).

Infringement.

The registered proprietor of a design may "bring an action for any damages arising from the application of his design or of any fraudulent or obvious imitation thereof for the purposes of sale to any article of manufacture or substance, or from the publication, sale, or exposure for sale, by any person of any article or substance to which any such design, or any fraudulent or obvious imitation (*c*) thereof, shall have been so applied, such person knowing that the proprietor thereof had not given consent to such application" (*d*).

Registration only affords *primâ facie* evidence in favour of a party suing (*e*).

It has been held (*f*) that there is nothing inconsistent between a grant of a patent and the existence of a coincident statutory right to a design.

PART II.—PATENTS.

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What is a patent.

A patent consists in a grant from the Crown of the exclusive right of exercising and selling the products of an invention. The right of the Crown to grant such a privilege to an individual for a limited time, in consideration of the benefit that would accrue

(*a*) s. 51. See *Wittman* v. *Oppenheim*, (1884) 27 Ch. D. 260.

(*b*) s. 54.

(*c*) "The eye alone is the judge of the identity of the two things": *per* Lord Westbury, *Holdsworth* v. *M'Crea*, (1867) L. R. 2 H. L. p. 388, and the Court ought not to take into consideration the question whether they accomplished the same useful object: *Hecla Foundry Co.* v. *Walker, Hunter & Co.*, (1889) 14 A. C. 550.

(*d*) s. 59. There is also a proceeding for penalties under s. 58. Under both sections the right of action is in the registered proprietor alone: *Woolley* v. *Broad*, (1892) 1 Q. B. 806; and there is no right of action for the acts mentioned in the section but that which is given by the statute (*ibid.*).

(*e*) s. 55. See also Patents, Designs, and Trade Marks Act, 1883, c. 57, and *Heath* v. *Rollason*, (1898) A. C. 499.

(*f*) *Werner Motors, Ltd.* v. *A. W. Gamage, Ltd.*, (1904) 1 Ch. 264, Byrne J., at p. 269, approved by Vaughan Williams, L.J., S. C. (1904) 2 Ch. 580, pp. 586 *sqq*.

to the public by the general user of such invention after the expiry of such time, existed at the common law. In a case decided in the reign of Queen Elizabeth it was laid down that "when any man by his own charge or industry, or his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, that in such cases the King may grant to him a monopoly patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth; otherwise not" (*a*). And the sixth section of the Statute of Monopolies (*b*), except in so far as it defines what is to be deemed a reasonable time, is merely declaratory of the common law. By that section it is provided that the general prohibition against monopolies contained in the earlier part of the statute "shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent shall not use. So also that they be not contrary to the law or mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient" (*c*).

Subject-matter of patent.

The subject-matter of a patent can only be some "new manufacture within this realm." The term "manufacture" in the statute includes two things, the manufactured product, and the mode of producing it. It includes the former for this reason, that "if the inventor could sell his invention keeping the secret to himself, and when it was likely to be discovered by another take out a patent, he might have practically a monopoly for a much longer period than fourteen years" (*d*).

Manufactured product.

Method of production.

"The word 'manufacture' not only comprehends productions, but it also comprehends the means of producing them. Therefore,

(*a*) *Darcy* v. *Allin*, (Jac. I.) Noy, p. 182.

(*b*) 21 Jac. I. c. 3.

(*c*) With the exception of this section, the chief enactments which now regulate the granting of patents are the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), and the amending Act (51 & 52 Vict. c. 50).

(*d*) *Per* Parke, B., *Morgan* v. *Seaward*, (1837) 2 M. & W. p. 559.

in addition to the thing produced, it will comprehend a new machine or a new combination of machinery, it will comprehend a new process or an improvement in an old process" (*a*). A combination of previously known processes may be the subject of a valid patent provided the combination is new and useful (*b*); and this is so even though the combination includes the subject of an existing patent (*c*). The new patentee may not, of course, exercise his right in infringement of the old or pioneer patent (*d*). He must obtain a licence to use it or must purchase the patented article to use in his own combination. But the mere application of old means to a new end does not constitute a new invention (*e*), and the converse of this proposition also applies (*f*). Nor is the sale of a constituent part of a patented article in itself an actionable infringement of a patent, even though the vendor at the time of the sale may be well aware that it was bought for the express purpose of being so used with other constituents as combinedly to form an infringement (*g*). No patent will be granted for a process which upon trial is proved to be unworkable. Where, however, an alternative and practicable method of working is also specified, the Court will upon terms, in spite of the technical rule that a patent, if bad in part, is bad altogether (*h*), allow a disclaimer of the unworkable process, and upon revocation thereof will grant a patent in respect of the practicable method. But no injunction will be granted for infringement by manufacture prior to the grant of the valid patent, unless the patentee can "establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge" (*i*).

Sale of constituent part of patented article.

Unworkable patents.

(*a*) *Per* Lord Westbury, *Ralston* v. *Smith*, (1865) 11 H. L. C. p. 246.

(*b*) *Cannington* v. *Nuttall*, (1871) L. R. 5 H. L. 205. A very small *quantum* of utility is sufficient to support a patent; *Welsbach Incandescent Gas Light Co.* v. *Sunlight Patent Gas Light Co.*, (1900) 1 Ch. 843.

(*c*) *Crane* v. *Price*, (1842) 4 M. & G. 580.

(*d*) *Brown* v. *John Hastie & Co., Ltd.*, (1904) 7 F. 97, Ct. of Sess.

(*e*) *Harwood* v. *Great Northern R. Co.*, (1864–5) 11 H. L. C. 654.

(*f*) *Consolidated Car Heating Co.* v. *Came*, (1903) A. C. 539, P. C.

(*g*) *The Dunlop Pneumatic Tyre Co., Ltd.* v. *David Moseley & Sons, Ltd.*, (1904) 20 T. L. R. 314, C. A.

(*h*) *Peck* v. *Hindes*, (1898) 67 L. J. Q. B. 272, at p. 273.

(*i*) *Geipel's Patents, In re*, (1903) 2 Ch. 715. For leave to amend specifications, see S. C. (1904) 1 Ch. 239, C. A. For the meaning of word "disclaimer" in s. 19 of the Patents, Designs and Trade Marks Act, 1883, see *Owen's Patent, In re*. (1898) 79 L. T. 458.

Novelty.

The manufacture must be new. "If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true or first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give" (*a*).

Previous use.

Want of novelty may arise in either of two ways. First by the use of the manufactured product by members of the public, which use will prevent the manufacture from being new, even though the parties using the product do not know how it is produced (*b*). The user by the public need not be general, probably user by a single individual will suffice (*c*), but it must be in public (as distinguished from use in a secret manner), as, for instance, where a lock for which a patent is claimed has been previously used upon a gate adjoining a high-road (*d*).

Previous disclosure.

Secondly, want of novelty may arise from the mode of producing the thing being known, or being so published as to be capable of being known to members of the public, even though the product has never been used. "It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated (*e*), or in a specification duly enrolled (*f*), it avoids the patent, though it is not shown that it ever was actually put in use" (*g*). What will amount to publication of a description of an invention is a question of fact depending on the circumstances of each case. The fact of one copy of a book giving a description of an invention, and one copy of another book giving a drawing of it, both published in America, being sent to the library of the Patent Office in London,

(*a*) *Per* Lord Blackburn, *Patterson* v. *Gas Light & Coke Co.*, (1877) 3 App. Cas. p. 244; and see *Acetylene Illuminating Co.* v. *United Alkali Co.*, (1902) 1 Ch. 494; S. C. 72 L. J. Ch. 214, C. A.; *Haggenmacher's Patents, In re*, (1898) 2 Ch. 280.

(*b*) *Morgan* v. *Seaward*, (1837) 2 M. & W. 544.

(*c*) *Carpenter* v. *Smith*, (1842) 9 M. & W. 300.

(*d*) *Ibid.*

(*e*) *Stead* v. *Williams*, (1844) 7 M. & G. 818.

(*f*) *Bush* v. *Fox*, (1856) 5 H. L. C. 707; *Betts* v. *Menzies*, (1861) 10 H. L. C. 117.

(*g*) *Per* Lord Blackburn, *Patterson* v. *Gas Light & Coke Co.*, (1877) 3 App. Cas. p. 244.

where, owing to want of space, they were put away in a room not readily accessible, was in one case held not sufficient publication (*a*). So, too, the fact of a single copy of a foreign treatise having been placed in the library of the British Museum, the books in which are catalogued according to their authors' names and not according to their subject-matter, has been held insufficient publication of the matter contained in the treatise (*b*). The conclusion derivable from the authorities has been thus expressed: "*Primâ facie* a patentee is not the first inventor of his patented invention if it be proved that before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country, either in the Patent Office or in any other library to which the public are admitted, and to which persons in search of information on the subject to which the patent relates would naturally go for information. But if . . . it be proved that the foreign publication, although in a public library, was not in fact known to be there, the unknown existence of the publication in this country is not fatal to the patent" (*c*). But even if a book containing a description of an invention be circulated in England to such an extent that the book may be said to be publicly known, still the invention will not be publicly known unless the description is sufficient to enable an ordinary workman of average intelligence and skill in the trade to make the thing from the description (*d*). A prior publication which does not contain as much information as would be required in the specification of the patent (*e*) will not avail to defeat a claim to novelty (*f*).

Disclosure to assistants and at exhibitions.

A disclosure to assistants or partners of an invention whilst it is being perfected, under an obligation to keep it secret till the

(*a*) *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. 531.

(*b*) *Otto* v. *Steel*, (1885) 31 Ch. D. 241; cp. *United Telephone Co.* v. *Harrison*, (1882) 21 Ch. D. 720; *Harris* v. *Rothwell*, (1887) 35 Ch. D. 416.

(*c*) *Per* Cotton and Lindley, L.JJ., *Harris* v. *Rothwell*, (1887) 35 Ch. D. p. 431.

(*d*) *Neilson* v. *Betts*, (1870–1) L. R. 5 H. L. 1.

(*e*) See below, pp. 705 *sqq*.

(*f*) *Per* Jessel, M.R., *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. p. 568, though see *dicta* to the contrary in *Anglo-American Brush Electric Light Corporation* v. *King & Co.*, (1892) A. C. 367. For procedure when a member of the public opposes the grant of a patent on the ground that the invention to which it relates is already patented, see *Reg.* v. *Comptroller-General of Patents* (1899) 1 Q. B. 909, C. A.

patent is taken out, is not of itself a disclosure to the public, for such persons could not make the invention known without a breach of duty (*a*). But if such persons in breach of their duty publish the invention, the inventor cannot obtain a patent for it, for, as pointed out above, if the public once becomes possessed of an invention by *any means whatever*, the consideration for the grant of the patent is gone. To this rule, however, there is one exception provided by statute, namely, where the publication is consequent upon an application for a patent made in fraud of the inventor, and during the period of provisional protection obtained thereon (*b*). If a patent has been fraudulently obtained by a party not entitled, on its revocation the true inventor may obtain a patent for the residue of the term (*c*). Where an application for a patent is made by the inventor the invention may be used and published between the date of such application and that of the sealing of the patent, without prejudice to the validity of the patent when granted (*d*). The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, will not prejudice the inventor's right to a subsequent patent, provided that before exhibiting he gives notice to the Comptroller of Patents of his intention to exhibit, and applies for a patent within six months of the opening of the exhibition (*e*).

Use or disclosure abroad.

The manufacture for which a patent is sought needs to be new only "within the realm." The fact that previously to an application being made for a patent the invention has been used or a description of it published elsewhere than within the realm is no objection to a patent being granted for it. The term "realm" only includes those portions of his Majesty's dominions over which the monopoly granted by the patent extends, and therefore does not include any colony (*f*). The form of patent in use prior to 1883 extended to the United Kingdom, the Isle of Man, and the Channel Islands, but now a patent is only to extend to the two former (*g*), and therefore presumably the Channel Islands

(*a*) *Morgan* v. *Seaward*, (1837) 2 M. & W. 544.
(*b*) 46 & 47 Vict. c. 57, s. 35.
(*c*) s. 26.
(*d*) s. 14.
(*e*) s. 39.
(*f*) *Rolls* v. *Isaac*, (1882) 19 Ch. D. 268.
(*g*) s. 16. But whether the omission of the Channel Islands was not

are no longer to be treated as parcel of the realm within the meaning of the Statute of Monopolies.

The words in the statute, "which others at the time of making such letters patent and grants shall not use," are not to be interpreted literally; any prior use will suffice to avoid the patent; the use need not have continued down to the time of the grant (*a*). Indeed, the proviso seems superfluous, its effect being already provided for in the requirement that the manufacture shall be new.

Utility.

But, "in order to support a right to the exclusive enjoyment of any invention, it is necessary that the party who takes out the patent should show that the invention . . . is not only new, but that it is useful to the public" (*b*). If an invention be altogether useless, a patent for it will be void as being against the words of the statute, which require that it shall not be "mischievous to the State" (*c*); but a very small amount of utility will suffice (*d*).

Who may be a patentee.

A patent may be granted either to a foreign or a British subject (*e*). It may be granted to more than one person, but one of the grantees must be the true and first inventor (*f*), or the legal representative of such inventor, and in this last case the application must be made within six months of the inventor's death (*g*).

Where letters patent are granted to more than one person, the grantees are tenants in common, and their liability over to a third party in respect of a warranty of the validity of the patent is joint and several (*h*).

Rights of co-owners.

In cases where the ownership of a patent or *secret process* of manufacture vests, by assignment or otherwise, in more than one person, the co-owners are entitled, apart from special contract, to work the patent or secret process without being

accidental seems doubtful. See ss. 104, 117.

(*a*) *Household Coal & Iron Co.* v. *Neilson*, (1843) 9 Cl. & F. 788.

(*b*) *Per* Gibbs, C.J., *Manton* v. *Manton*, (1815) Dav. P. C. p. 348.

(*c*) *Per* Parke, B. (1837) *Morgan* v. *Seaward*, 2 M. & W. p. 562.

(*d*) *Per* Jessel, M.R., *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. p. 582; *Welsbach Incandescent Light Co.* v. *Sunlight Co.*, (1900) 1 Ch. 843.

(*e*) 46 & 47 Vict. c. 57, s. 4.

(*f*) 21 Jac. I. c. 3, s. 6; 46 & 47 Vict. c. 57, s. 5.

(*g*) 46 & 47 Vict. c. 57, s. 34.

(*h*) *National Society for Distribution of Electricity* v. *Gibbs*, (1900) 2 Ch. 280.

liable to account to each other for the profits. Nor is this rule varied when one of the co-owners is mortgagee of another's share (*a*).

Assignment of provisional protection.

It has been held that an assignment of the provisional protection automatically acquired by the approved application for a patent does not constitute a legal assignment of the actual patent when granted, but merely confers upon the assignee an equitable right to have the patent transferred to him (*b*).

True and first inventor.

There are two cases in which a man is treated as the true and first inventor of a patent though he be not so in fact.

Invention communicated from abroad.

In the first place he may not have invented it at all, he may have imported it from abroad (*c*). "If the invention be new in England a patent may be granted though the thing was practised beyond the sea before; for the statute speaks of new manufactures within this realm; so that if they be new here it is within the statute, for the Act intended to encourage new ideas useful to the kingdom, and whether learned by travel or by study it is the same thing" (*d*). However, "the cases holding that a communication from abroad would enable a person to take out a patent were an extension of the law, and originated at a time when communication with foreign parts was so difficult that there was merit in obtaining an invention from abroad" (*e*); the rule they establish is an anomaly, not depending on any principle whatever (*f*).

If an invention is in fact new in this country, it seems that anybody who becomes possessed of the knowledge may take out a patent, though he be not the person to whom the communication was first made, and, therefore, not, strictly speaking, the importer. "There is no law which says that if a man from abroad communicates to A., who communicates with B., B. may not take out the patent" (*g*). A patent may be granted to a

(*a*) *Steers* v. *Rogers*, (1893) A. C. 232; *Heyl-Dia* v. *Edmunds*, (1900) 81 L. T. 579.

(*b*) *Bowden's Patents Syndicate, Ltd.* v. *Smith*, (1904) 2 Ch. D. 86.

(*c*) By s. 103, provision is made for granting protection to foreign patents in certain cases.

(*d*) *Per Cur.*, *Edgeberry* v. *Stephens*, (1696) 2 Salk. 447. See too *per* Tindal, C.J., *Beard* v. *Egerton*, (1846) 3 C. B. p. 128.

(*e*) *Per* Jessel, M.R., *Marsden* v. *Saville Street Co.*, (1878) 3 Ex. D. p. 204.

(*f*) *Ibid.* p. 205.

(*g*) *Per* Jessel, M.R., *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. p. 552.

foreign resident abroad for an invention communicated to him by another foreigner also resident abroad (*a*). But it is clear that no one can patent an invention made in this country by some one else, and subsequently communicated to the applicant; and before the statute of 1883 (*b*) it made no difference that such applicant was the personal representative of the testator (*c*).

Where a person seeks to obtain a patent on the ground of a communication from abroad, and not on the ground of his own invention, it is always necessary that in so doing he should not commit a breach of good faith. If a person abroad communicates an invention to a person in this country for the purpose of the latter taking out a patent as agent for him, and the agent takes out the patent in his own name as for his own invention, it will be altogether void (*d*).

Where a claim as inventor is based on the fact of communication from abroad, this must be stated in the application (*e*).

Of two inventors he who first publishes is first inventor.

The second case in which the law treats a person as the true and first inventor, though he is not so in fact, is where he did indeed invent the manufacture, but somebody else had previously invented the same thing though without patenting it (*f*). If two inventors apply for patents for the same invention, the Comptroller may (*g*) refuse to seal a patent on the application of the second applicant (*h*), the first applicant being the first inventor within the meaning of the statute.

Specification.

Every application for a patent must be accompanied by a specification, provisional or complete (*i*); if the former only is deposited with the application, then a complete specification must be deposited within nine months (*k*). The complete specification must "particularly describe and ascertain the nature of the invention and in what manner it is to be performed, and must be accompanied by drawings if required." It must further "end with a distinct statement of the invention claimed" (*l*).

(*a*) *Re Wirth's Patent*, (1879) 12 Ch. D. 303.

(*b*) s. 34. See above, p. 702.

(*c*) *Marsden* v. *Saville Street Co.*, (1878) 3 Ex. D. 203.

(*d*) *Milligan* v. *Marsh*, (1856) 2 Jur. N. S. 1083.

(*e*) Patent Rules, 1885, Form A. 1.

(*f*) *Per* Jessel, M.R., *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. p. 556.

(*g*) "May" here seems equivalent to "shall."

(*h*) s. 7.

(*i*) s. 5.

(*k*) s. 8.

(*l*) s. 5. This section is directory

Limitation of claim.

The claim must be carefully limited to that for which protection can be given. If a patentee affects to assert a monopoly in matters which are *publici juris* as well as in those as to which he is really an inventor, he makes a bad claim, since he is placing unfair impediments in the way of the lawful exercise of manufacture and invention by other people (*a*). So, too, a specification is bad if something is claimed as an improvement which is in fact devoid of utility (*b*).

Where the invention consists in an addition to, or a development of, something already before the public, the inventor must be careful to specify the precise nature of the improvement which he alleges is his invention (*c*), and to distinguish between what is new and what is old, disclaiming all special right in the latter (*d*). If the claim is simply for a combination, it sufficiently appears that there is no claim in respect of the component parts, and, therefore, it is unnecessary to distinguish old and new (*e*).

Full disclosure required.

A specification must give such a full and complete account of the invention as will enable people of ordinary intelligence and conversant with the subject-matter to produce the patented article from the description.

In the case of a mechanical invention, for example, the question is not whether a person entirely ignorant of mechanics on the one hand, or a skilled mechanical engineer on the other, but whether a fairly competent and intelligent workman, could construct the machine from the specification (*f*). A patentee must disclose the whole of his invention. He cannot take out a patent for part and keep back another part as a trade secret (*g*). He

only, and non-compliance with it does not invalidate a patent: *Vickers, Sons & Co.* v. *Siddell*, (1890) 15 A. C. 496.

(*a*) *Per* Gibbs, C.J., *Bovill* v. *Moore*, (1816) Dav. P. C. p. 404; *per* Lord Ellenborough, C.J., *Harmar* v. *Playne*, (1809) *ibid.* p. 318.

(*b*) *Morgan* v. *Seaward*, (1837) 2 M. & W. 544.

(*c*) *Jandus Arc Lamp & Electric Co., Ltd.* v. *Arc Lamps, Ltd.*, (1905) 21 T. L. R. 308.

(*d*) *Clark* v. *Adie*, (1877) 2 App. Cas. 315.

(*e*) *Per* Lord Cairns, *Harrison* v. *Anderston Foundry Co.*, (1876) 1 App. Cas. p. 578; *Proctor* v. *Bennis*, (1887) 36 Ch. D. 740.

(*f*) *Per* Alderson. B., *Morgan* v. *Seaward*, (1837) 1 Webst. P. C. p. 174; *per* Jessel, M.R., *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. pp. 569–70; see too *Wegman* v. *Corcoran*, (1878–9) 13 Ch. D. 65.

(*g*) *Wood* v. *Zimmer*, (1805) 1 Webst. P. C. 82 n.

may not insert misleading details (*a*). If he "suppresses anything, or if he misleads, or if he does not communicate all he knows, his specification is bad, . . . but if he makes a full and fair communication, as far as his knowledge at the time extends, he has done all that is required" (*b*). If there are two ways of carrying out a design, of which the inventor is aware, he must state that which is most advantageous (*c*).

Specification by trustee for foreign inventor.

If a person takes out a patent in this country as a trustee for a foreign inventor, the specification is not bad because it does not communicate everything which is known to the foreigner on the subject of the invention. The knowledge of the actual patentee is that which is to be considered (*d*). On the other hand, in such a case, if the specification is imperfect in not containing a fair description of the alleged invention, it is no answer to say that the patentee disclosed all that he knew (*e*).

Amendment of specification.

A specification may from time to time be amended on due application at the Patent Office, but no amendment may be made so as to claim an invention substantially larger than, or substantially different from, the existing specification (*f*). Even while an action is pending a patentee who has made too large a claim in his specification may by leave of the court apply at the Patent Office to disclaim a portion of it (*g*), but *pendente lite*, without such permission an amendment, by leave of the Comptroller of Patents, is irregular and void (*h*).

It has, however, been held that the subsequent presentation of a petition for the revocation of a patent does not suspend the jurisdiction of the Comptroller of Patents to grant leave to amend the specification of a patent under s. 18 (sub-s. 10) of the Act of

(*a*) *Crompton* v. *Ibbotson*, (1828) 1 Webst. P. C. 83 n.; *Bickford* v. *Skewes*, (1841) *ibid.* 214.

(*b*) *Per* Bayley, J., *Lewis* v. *Marling*, (1829) 1 Webst. P. C. p. 496.

(*c*) *Per* Alderson, B., *Morgan* v. *Seaward*, (1837) *ibid.* p. 174; and no patent will be granted for an unworkable process: *Geipel's Patent, In re*, (1903) 2 Ch. 715.

(*d*) *Plimpton* v. *Malcolmson*, (1876) 3 Ch. D. 531.

(*e*) *Wegman* v. *Corcoran*, (1878-9) 13 Ch. D. 65.

(*f*) 46 & 47 Vict. c. 57, s. 18; *Jandus Arc Lamp & Electric Co., Ltd.* v. *Arc Lamps, Ltd.*, (1905) 92 L. T. 447; and see *Kelly* v. *Heathman*, (1890) 45 Ch. D. 256.

(*g*) See *Bray* v. *Gardner*, (1887) 34 Ch. D. 668, and *Gaulard* v. *Lindsay*, (1888) 38 Ch. D. 38; and see *Geipel's Patent, In re*, (1904) 1 Ch. 239, C. A.

(*h*) *Brooks & Co., Ltd.* v. *Lycett's Saddle & Motor Accessory Co., Ltd.*, (1904) 1 Ch. 512.

1883 (*a*). In any case of amendment no damages are recoverable for any infringement prior to the amendment, unless the patentee establishes that the original claim was framed in good faith and with reasonable skill and knowledge (*b*).

Duration of patent.

After the acceptance at the Patent Office of a complete specification, the applicant is protected as if he had obtained a patent (*c*). The patent when sealed is to bear date as from the day of application (*d*), and gives protection for fourteen years from that date throughout the United Kingdom and the Isle of Man, subject to the payment of certain fees (*e*). In some cases, however, where the patentee has been inadequately remunerated, an extension of the term for a period not exceeding seven or, in exceptional cases, fourteen years may be given, or a fresh patent, subject to conditions, may be granted (*f*).

Revocation of patents wrongly granted.

Whenever the Crown grants a patent unadvisedly, such grant can always be revoked, for it is assumed that the Crown was deceived, and the patentee cannot be allowed to take advantage of such deception (*g*). But in all cases a petition for revocation must be heard in open court (*h*). Every ground on which a patent may be revoked affords also a good defence if the patentee sues for an infringement of his patent (*i*). In such an action, therefore, the defendant may always prove, if he can, that the grantee was not the inventor, that the invention was not new or not useful, that the specification was imperfect or misleading, or that some direct fraud has been practised in obtaining the patent (*k*).

Invalidity a defence in action for infringement.

Patent fails if bad in part.

If a patent is bad in part, it fails entirely. When, for instance, it is granted in respect of several inventions, if the tribunal finds

(*a*) *Woolfe* v. *Automatic Picture Gallery, Limited*, (1903) 1 Ch. 18, C. A.

(*b*) s. 19; and see *Geipel's Patent, In re*, (1903) 2 Ch. 715.

(*c*) s. 15.

(*d*) s. 13.

(*e*) ss. 16, 17.

(*f*) s. 25. *Currie & Timmis's Patent, In re*, (1898) A. C. 347, P. C.; *Parson's Patent, In re*, (1898) A. C. 673, P. C.; *Thorneycroft's Patent, In re*, (1899) A. C. 415, P. C.; *Henderson's Patent, In re*, (1901) A. C. 616; *Peach's Patent, In re*, (1902) A. 414.

(*g*) *Morgan* v. *Seaward*, (1837) 2 M. & W. 544.

(*h*) *Clifton's Patent, In re*, (1904) 2 Ch. 357.

(*i*) s. 26.

(*k*) *Acetylene Co.* v. *United Alkali Co.*, (1902) 1 Ch. 494; S. C., C. A., 72 L. J. Ch. 214; *American Steel & Wire Co.* v. *Glover*, (1902) 50 W. R. 284; *Consolidated Car Co.* v. *Came*, (1903) A. C. 509.

that one of the alleged inventions has no novelty or no utility, the patentee can maintain no action (*a*). "If a patent is taken out for many different things, the entire discovery of all those things is the consideration on which the king is induced to make the grant. That consideration is entire, and if it fails in any part it fails *in toto*" (*b*).

Intention and knowledge immaterial to infringement.

Assuming a patent to be valid, the patentee has an absolute right of property, every infringement of which gives him a cause of action, whether the party infringing knew of the patent or not, and whether he intended to infringe it or not (*c*). It is, however, requisite that after warning and threat of action the legal proceedings against the infringer should be prosecuted by the plaintiff with "due diligence" (*d*).

Infringement by article produced.

There are two kinds of questions which arise with regard to infringement; first with respect to the nature or construction of the thing itself which is alleged as an infringement; secondly, with respect to the use which has been made of the thing.

A thing is an infringement which is a substantial reproduction of the thing patented, or substantially produced by the process patented. The question, of course, is purely one of fact. The real difficulty always is to decide what exactly it is for which the patent is given. No man can claim protection for anything which does not appear in his specification. It is open to others to allege that the specification does not properly describe his invention, but it does not lie in his mouth to say so (*e*).

Where a patent is simply for a process, it is open to others to attain a like result by other means, provided the new method is something more than a merely improved adaptation of the earlier process (*f*), but it is otherwise where the process and the result are both patented (*g*). Where one of a series of patents (covering every known method of producing a particular article) expires

(*a*) *Brunton* v. *Hawkes*, (1821) 4 B. & Ald. 541; cp. *Morgan* v. *Seaward*, (1837), *supra*, p. 707.

(*b*) *Per* Bayley, B., *Brunton* v. *Hawkes*, (1821) 4 B. & Ald. p. 552.

(*c*) *Per* Parke, B., *Heath* v. *Unwin*, (1852) 25 L. J. C. P. p. 19; *per* Lord Westbury, *Curtis* v. *Platt*, (1864) 11 L. T. N. S. p. 250.

(*d*) *The Haskell Golf Ball Co.* v. *Hutchinson & Main*, (1904) 20 T. L. R. 606.

(*e*) *Per* Lord Blackburn, *Clark* v. *Adie*, (1877) 2 App. Cas. p. 333.

(*f*) *Brown* v. *John Hastie & Co.*, (1904) 7 F. 97, Ct. of Sess.

(*g*) *Badische Anilin und Soda Fabrik* v. *Levinstein*, (1883) 24 Ch. D. 156.

by effluxion of time, and the article in its manufactured state exhibits no indication of the method by which it has been produced, the onus of showing that a still existing patent has been infringed rests upon the party seeking the protection of the Court (*a*).

Where a man patented an addition to a known piece of machinery, which produced certain beneficial results in its working, it was held no infringement for others to produce the same result by substituting in the machine for the patented part something equivalent in effect but different in kind (*b*). But where the patent was for a machine which was a combination of old contrivances, it was held an infringement to take the mechanical equivalents of those contrivances and combine them in the same manner as the patentee had done. Here the essence of the invention was the combination, and that was directly imitated (*c*).

If a mere combination is patented, it is lawful to manufacture separately its component parts, though they may be capable and indeed intended for use in such combination (*d*). But if a man supplies all the parts of a machine ready to be put together without any special skill being required, he in effect supplies the machine as a whole, and, if as a whole it is patented, he will be guilty of infringement, although each part by itself is unprotected (*e*).

An invention may be divisible in various subordinate parts, and, if so, there may be an infringement by copying one of these parts. Thus, where a plaintiff had a patent for making metal wheels in one solid mass, and the defendants made wheels by the same method, except as to the rim, which they formed in a different way, it was held an infringement (*f*).

(*a*) *Saccharin Corporation* v. *Quincey*, (1900) 2 Ch. 246 : and see *Saccharin Corporation* v. *Wild*, (1903) 1 Ch. 410, C. A. and *Saccharin Corporation* v. *White*, (1903) 88 L. T. 850.

(*b*) *Seed* v. *Higgins*, (1860) 8 H. L. C. 550.

(*c*) *Proctor* v. *Bennis*, (1887) 36 Ch. D. 740 ; and see *Brown* v. *J. Hastie & Co.*, *supra*.

(*d*) *M'Cormick* v. *Gray*, (1862) 31 L. J. Ex. 42 ; *Dunlop Pneumatic Tyre Co., Ltd.* v. *David Moseley & Sons, Ltd.*, (1904) 1 Ch. 612 ; 20 T. L. R. 314, C. A. ; see also *Sirdar Rubber Co., Ltd.* v. *Wallington, Weston & Co.*, (1905) 1 Ch. 451.

(*e*) *Per* Pearson, J., *United Telephone Co.* v. *Dale*, (1884) 25 Ch. D. pp. 782-3.

(*f*) *Smith* v. *London & North-Western R. Co.*, (1853) 2 E. & B. 69.

A claim for a combination may include a number of minor combinations leading up to the general result, and, if so, each of the subordinate combinations is protected (*a*), but where only the general combination is claimed, the patentee is not entitled to say that he has a monopoly in every detail of the arrangement which he has introduced (*b*). But the repair of a patented article when such repair is virtually a reconstruction of an out-worn thing amounts to an infringement, and may be restrained by injunction (*c*).

Repair of patented article when an infringement.

Apparently, however, anything short of complete reconstruction is admissible, the purchaser of a patented article being entitled to prolong its life by "fair repair." As to what constitutes "fair repair" is a question of fact to be decided in each particular case (*d*).

Infringement by user.

The right of the patentee is that he, to the exclusion of every one else, should make, use, exercise, and vend his invention (*e*). It is accordingly an infringement of the patent to manufacture in this country the patented article for the purpose of sale, though no sale be in fact effected (*f*). It is equally an infringement to import such article from abroad and sell it, and it makes no difference whether it is the process of manufacture or the result that is the subject of protection (*g*).

Mere possession is not sufficient, and thus a declaration which alleged as the infringement an exposing to sale was held bad on demurrer (*h*). It has, however, been held in the subsequent case of the *British Motor Syndicate* v. *Taylor* (*i*) that the unauthorised exposure of a patented article for sale constitutes an actionable "using and vending" of such article. Again, possession may involve a use. If a man has bottles sealed with a patented capsule, he is using the invention, inasmuch as the capsules are

(*a*) *Lister* v. *Leather*, (1858) 8 E. & B. 1004; and see *Saccharin Corporation* v. *Anglo-Continental Chemical Works*, (1901) 1 Ch. 414.

(*b*) *Per* Lord Hatherley, *Clark* v. *Adie*, (1877) 2 App. Cas. pp. 327–8.

(*c*) *Dunlop Pneumatic Tyre Co.* v. *Neal*, (1899) 1 Ch. 807.

(*d*) *Sirdar Rubber Co., Ltd.* v. *Wallington, Weston & Co.*, (1905) 1 Ch. 451.

(*e*) 46 & 47 Vict. c. 57, s. 33; Sch. 1, Form D.

(*f*) *Oxley* v. *Holden*, (1860) 8 C. B. N. S. 666.

(*g*) *Von Heyden* v. *Neustadt*, (1880) 14 Ch. D. 230; *Badische Anilin und Soda Fabrik* v. *The Basle Chemical Works Bindschedler*, (1898) A. C. 200.

(*h*) *Minter* v. *Williams*, (1835) 4 A. & E. 251.

(*i*) (1901) 1 Ch. 122, C. A.

discharging for his benefit the very purpose for which they are intended (*a*). Although possession does not constitute user, there cannot well be user without possession, actual or constructive. It is not a cause of action to pass through the custom-house, as agent for another, articles which infringe a patent, even though the agent is aware of the infringement (*b*).

Measure of damages.

Where a patentee of an invention is in the habit of licensing the use of his invention for a fixed royalty, the measure of damages for infringement of his patent is the amount of the royalty which the infringer would have had to pay (*c*). Where, however, the patentee is not in the habit of granting licences, but manufactures his own invention, the measure of damages is the loss of the profit which he would have made if he had himself manufactured and sold the articles manufactured and sold by the infringer (*d*). If the infringer sells the patented articles at prices lower than the patentee's original prices, and the patentee to meet the competition reduces his price to the same point, the latter is entitled to recover the profit which he would have made if he had effected all the sales, both his own and the infringer's, at his own original price (*e*). On the other hand, if the patentee himself reduces his price below that of the infringer in order to undersell him, he can only recover the profit which he would have made if he had effected all the sales at the lower price (*f*). Where a patentee elects to take an account of profits, he stands in the shoes of the infringer and condones his wrong-doing (*g*). He is, however, under such circumstances, entitled to full disclosure of the names and addresses of the customers to whom the infringer has sold the goods, although the object of such disclosure may be proceedings against the customers for infringement (*h*). It has been held, in cases where a patent for

(*a*) *Neilson* v. *Betts*, (1870–1) L. R. 5 H. L. 1; and see *British Mutoscope & Biograph Co., Ltd.* v. *Homer*, (1901) 1 Ch. 671.

(*b*) *Nobel's Explosives Co.* v. *Jones, Scott & Co.*, (1881–2) 17 Ch. D. 721; 8 App. Cas. 1; *Saccharin Corporation* v. *Reitmeyer*, (1900) 2 Ch. 659. See further, as to user, *United Telephone Co.* v. *Sharples*, (1885) 29 Ch. D. 164.

(*c*) *Penn* v. *Jack*, (1867) L. R. 5 Eq. 81.

(*d*) *United Horse Shoe & Nail Co.* v. *Stewart*, (1888) 13 App. Cas. 401.

(*e*) *American Braided Wire Co.* v. *Thomson*, (1890) 44 Ch. D. 274.

(*f*) *United Horse Shoe & Nail Co.* v. *Stewart*, (1888) *supra*.

(*g*) *Neilson* v. *Betts*, (1871) L. R. 5 H. L. 1 at p. 22.

(*h*) *Saccharin Corporation* v. *Chemical & Drugs Co.*, (1900) 2 Ch. 556.

the manufacture of certain goods expires during the existence of a contract for their supply by an infringer, that the measure of damages is the loss sustained by the patentee, in respect of that portion of the contract actually supplied by the infringer during the life of the patent (*a*).

Injunction.

As in order to obtain an injunction it is sufficient to show a threatened wrong, a possession for use is a ground for injunction, though not for damages. Thus in *Adair* v. *Young* (*b*), where the defendant was the master of a vessel at Liverpool, which had arrived in that port fitted with pumps infringing the plaintiff's patent, an injunction was granted restraining him from future user, although he had never used them except abroad, and it seems to have been considered that he had not actually been guilty of infringement (*c*).

Rights conferred by licence or assignment, or by sale of patented article.

If a man is possessed of patents abroad and in this country for the same invention, he cannot complain that it is an infringement of the latter, if goods sold by him under the former are imported and used in this country (*d*); but if he assigns or grants licences under his foreign patent, that does not give a right to introduce here the goods made by the foreign licensees or patentees (*e*). Patent rights in this country are now divisible, and may by assignment come into one man's hands for one part of the country, and into another's for another (*f*). It is apprehended that under such circumstances such different parts of the country would *quâ* the patent right become foreign to one another, and that the patentee for each part would have a right to restrain all importation.

It has, however, been held that the mere assignment of the provisional, or temporary, protection accorded to a patentee upon application for letters-patent, does not constitute such an

(*a*) *British Insulated Wire Co.* v. *The Dublin United Tramways Co.*, (1900) 1 Ir. R. 287.

(*b*) (1879) 12 Ch. D. 13. As to foreign ships, see 46 & 47 Vict. c. 57, s. 43.

(*c*) *Per* Brett, L.J., (1879) 12 Ch. D. p. 20.

(*d*) *Betts* v. *Wilmott*, (1871) L. R. 6 Ch. 239.

(*e*) *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.*, (1883) 25 Ch. D. 1.

(*f*) 46 & 47 Vict. c. 57, s. 36. As to licences, see *Heap* v. *Hartley*, (1889) 42 Ch. D. 461. As regards priorities in licences and assignments, see *New Ixion Tyre & Cycle Co.* v. *Spilsbury*, (1898) 2 Ch. 484, C. A., affirming 46 W. R. 567.

assignment of the patent itself as will justify the assignee in suing an infringer without joining the original assignor. An agreement assigning provisional protection apparently raising no more than an equitable right in the assignee to have the valid patent transferred to him as soon as it is granted (*a*).

It has, moreover, been decided that if a company (the registered owners of a patent) are in liquidation, and the liquidators of the company agree to sell the assets, including the company's rights in the patent, to a third party, the assignment of such rights to the purchaser must be made before the dissolution of the company takes place, or the purchaser will not be entitled to have his name entered on the register as owner of the patent.

The legal interest in the letters-patent automatically re-vesting in the Crown upon the dissolution of the corporation to which they had been granted (*b*).

The grant of a patent did not formerly operate in any way to restrict the right of the Crown to the use of the invention (*c*). Now, however, patents granted on application made subsequently to 1883 have to all intents the like effect against the Crown as against a subject (*d*). Provision is made for the granting of licenses and assignments to officers of the Crown (*e*).

PART III.—TRADE MARKS AND TRADE NAMES.

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Unfair use by one trader of the reputation of another.

It is the right of every person who deals in commodities that his trade reputation should be protected, and that the customers who would naturally be attracted to him, and out of whom he might expect to make profit, should not be diverted to his rivals

(*a*) *Bowden's Patent Syndicate, Ltd.* v. *Herbert Smith & Co.*, (1904) 2 Ch. 86; S.C., (1904) 2 Ch. 122, C. A.

(*b*) *Taylor's Agreement Trusts. In re*, (1904) 2 Ch. 737.

(*c*) *Feather* v. *The Queen*, (1865) 6 B. & S. 257.

(*d*) 46 & 47 Vict. c. 57, ss. 3, 27, 45.

(*e*) ss. 27, 44.

by unfair and dishonest means. "When one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader" (*a*). "Nothing can be better established than this, that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer" (*b*).

How injurious.

The injury done by such latter representation may be twofold. In the first place the goods dishonestly sold may be inferior to those of the person of whose make they are alleged to be, and in such case his trade reputation may suffer; in the second if there is no such inferiority, he may possibly have lost a customer who particularly desired to have his goods, and who made the purchase in question solely because he believed that he was getting them.

Rules governing right to exclusive user.

And this exclusive right to the use of a trade name or a trade mark in connection with a particular class of goods applies to all commodities belonging to the special class of articles in which the proprietor of the trade name or registered trade mark ordinarily deals, and in respect of which such trade mark was originally registered (*c*).

Thus in the case of *Boord & Son* v. *Huddart* (*d*) it was held that the plaintiffs (who were distillers) were entitled to an injunction restraining the defendant from using their trade mark in connection with the sale of a particular liqueur which the plaintiffs did not themselves manufacture at the time when the defendant adopted the mark.

And *à fortiori* this rule applies when both plaintiff and defendant are manufacturers of similar goods at the time when the defendant first imitates the plaintiff's method of distinguishing his wares. No trader being justified in taking the peculiar symbol, device or mark by which another trader

(*a*) *Per* Lord Blackburn, *Singer Manufacturing Co.* v. *Loog*, (1882) 8 App. Cas. p. 29.

(*b*) *Per* Jessel, M.R., *Singer Manufacturing Co.* v. *Wilson*, (1876) 2 Ch. D. p. 440; see *Reddaway* v. *Banham*, (1896) A. C. 199; *Sen Sen Co.* v. *Britten*, (1899) 1 Ch. 692.

(*c*) Trade Marks Act, 1905, s. 8 (5 Edw. VII., c. 15), and see *The Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston & Tee, Ltd.*, (1904) 20 T. L. R. 238, C. A. No trader is entitled to register a trade mark for goods in which he does not deal: *Batt* v. *Dunnett*, (1899) A. C. 428.

(*d*) (1904) 89 L. T. 718.

distinguishes his goods on the market, and so attracting custom to himself from his rival (*a*).

Works of literature.

On the same principle the publisher of a work in which there is no copyright may still be protected against the sale of a work on the same subject put forward in such a form as to simulate his own (*b*). So, although as a rule there can be no copyright in a mere title, yet one man may not, in a deceptive and injurious manner, employ or colourably imitate a title already in use by another (*c*). But, in order that the earlier of the two authors or publishers may have a legal right to restrain the later from using an identical, or colourable, imitation of the title of an existing book or periodical, it is essential for him to show that such earlier user has procured for his book or periodical actual public notoriety. The mere fact that one magazine or journal anticipates another in the issue of its first number by a few days will not necessarily make an infringement of its title actionable. It is, however, an actionable fraud on an author of established reputation to sell under his name a work which in fact is not from his pen, for such a publication will either compete with his genuine works if of equal merit, or injure the author's reputation if inferior (*d*).

Right of author in pseudonym or nom-de-plume.

With regard to the vexed question of the exclusive right of an author to the user of a pseudonym or pen-name, it appears probable that the rule of law prohibiting any man, engaged in business, from trading in such a way as to induce the public to believe that the goods in which he deals are in fact the goods of another applies to the profession of letters. Consequently, when by the persistent user of either an assumed proper name, or an assumed word, or collocation of words, an author succeeds in so identifying his writings with the pseudonym under which he writes, that the subsequent assumption of a similar appellation by another writer, affords *primâ facie* evidence of intent to deceive; it is but reasonable to suppose the author will be

(*a*) *Weingarten Bros.* v. *Bayer & Co.*, (1905) 92 L. T. 511, H. L.

(*b*) *Metzler* v. *Wood*, (1878) 8 Ch. D. 606.

(*c*) *Weldon* v. *Dicks*, (1878) 10 Ch. D. 247; *Dicks* v. *Yates*, (1881) 18 Ch. D. 76; see *Borthwick* v. *The Evening Post*, (1888) 37 Ch. D. 449.

(*d*) *Lord Byron* v. *Johnston*, (1816) 2 Mer. 29; *Archbold* v. *Sweet*, (1832) 1 Moo. & R. 162.

entitled to restrain by injunction any other person from using the same *nom-de-plume* (*a*).

Two kinds of misrepresentation.

Fraud.

The cases of misrepresentation fall into two classes (*b*). First of all there are those cases where a trader has expressly or impliedly by false and fraudulent devices caused in the mind of those purchasing his goods the belief that they are in fact purchasing the goods of some one else (*c*), nor does innocence on the part of the infringer exonerate him from liability (*d*);

Infringement of trade-mark.

secondly, there are those cases where a trader has been in the habit of affixing to his goods themselves or to the wrapper, case, or vessel containing the goods, some word, device, or sign, known as a trade-mark, and this trade-mark has been infringed, whether accidentally or by design, by the use of one of a substantially identical character on the part of a rival trader. The essence of a trade-mark, in the strict sense of the term, is that it is appropriated to the person who uses it. There are many trade-names and descriptions as to which there is no such appropriation, but which nevertheless will be protected against fraudulent imitation.

It is, moreover, an unfair method of trading obnoxious on the ground of deceit (though perhaps not actionable by a rival trader (*e*)) for a manufacturer of, or dealer in, various descriptions of goods to apply to, and display by way of public advertisement of the special quality of, one particular commodity the medals or awards which he has obtained in respect of another and totally distinct description of wares.

Previously to the year 1875, the term trade-mark was nowhere accurately defined. Especially with regard to the use of words and names, it was not always easy to discover from the decisions of the Courts what might be exclusively appropriated and what not. It is now, however, provided by section 9 of the Trade Marks Act, 1905 (*f*) (which comes into operation on April 1st,

(*a*) And see *Clemens* v. *Belford*, (1883) (an American case), reported 11 Bissell's reports, 459.

(*b*) *Per* Jessel, M.R., *Singer Manufacturing Co.* v. *Wilson*, (1876) 2 Ch. D. pp. 441–4.

(*c*) *Pinet et Cie* v. *Maison Louis Pinet, Ltd.*, (1898) 1 Ch. 179; *Jameson* v. *Dublin Distillers' Co.*, (1900) 1 Ir. R. 43.

(*d*) *Thwaites & Co.* v. *M'Evilly*, (1904) 1 Ir. R. 310.

(*e*) *F. King & Co.* v. *Gillard & Co.*, (1905) 2 Ch. 7, C. A.

(*f*) 5 Ed. VII. c. 15.

1906), that a registrable trade-mark must consist of at least one of the following essential particulars:—

(1) The name of a company, individual or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in his business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(5) Any other distinctive mark, but a name, signature or word or words, other than such as fall within the descriptions in the above paragraphs (1, 2, 3, 4) shall not, except by order of the Board of Trade or the Court be deemed a distinctive mark (*a*).

Trade-marks apart from statute.

Prior to statutory enactment it was however clear that no one could claim an exclusive right to the use of some purely descriptive expression. Every one has a right to the ordinary use of the English language, and it would be unjust for one manufacturer to prevent another using a natural expression for the purpose of describing his goods. Accordingly it was held that a brewer who had been in the habit of putting on his bottles a label with words "nourishing stout," had no right to restrain another brewer from the use of the like words on his labels (*b*). However a name primarily descriptive may acquire a special secondary signification, and in the trade come to denote the goods of a particular maker, or some special class or quality of goods. Secondary significations have been attached to names which primarily denote either the material of which the goods are made (*c*), or the place of origin (*d*), and the Court will restrain persons from using such a name with intent to deceive. It was however decided by the Privy Council in the recent case of the *Grand Hotel Company of Caledonia Springs* v. *Wilson* (*e*), that

Descriptive words.

Geographical words.

(*a*) Trade marks in use before August 13th, 1875, need not in all respects conform with the above requirements.

(*b*) *Ragget* v. *Findlater*, (1873) L. R. 17 Eq. 29.

(*c*) *Reddaway* v. *Banham*, (1896) A. C. 199.

(*d*) *Radde* v. *Norman*, (1872) L. R. 14 Eq. 348; *M'Andrew* v. *Bassett*, (1864) 33 L. J. Ch. 561; see *Wotherspoon* v. *Currie*, (1872) L. R. 5 H. L. 508; *Montgomery* v. *Thompson*, (1891) A. C. 217.

(*e*) (1903) 89 L. T. 456.

the defendant could not be restrained from using the place of origin of a natural product as part of its description, although the plaintiffs thereby suffered damage (*a*).

Name of firm or individual trader.

The name of a firm or individual might be a trade-mark good as against the world in general (*b*). Other persons, however, of the same name could not be prevented from using such name, provided they did so without intent to deceive (*c*). But the trade use of an identical or very similar name, hitherto appropriated to a particular article, affords *primâ facie* evidence of intention to deceive, and will be restrained by injunction (*d*). And the same rule applies when the appellation has been assumed by inadvertence (*e*).

Rights of registered owner of identical or similar trade-marks.

Where, however, two or more persons are registered proprietors of the same (or substantially the same) trade-mark in respect of the same goods, no rights of exclusive user of such trade-mark are (except so far as their respective rights may be defined by the Court) capable of acquisition by any one of such persons as against any other merely by the registration thereof, although each of such persons otherwise has the same rights as if he were the sole registered proprietor thereof (*f*).

Fancy or invented words.

Generally, however, a trader who wished to appropriate a word to his own use had to employ one chosen in an arbitrary and fanciful manner, and having no natural connection with the goods to which it was applied (*g*). Familiar instances of fancy

(*a*) And see s. 9 (sub-s. 4) Trade Marks Act, 1905.

(*b*) *Per* Lord Kingsdown, *Leather Cloth Co.* v. *American Leather Cloth Co.*, (1865) 11 H. L. C. p. 538.

(*c*) *J. & J. Cash, Ltd.* v. *Joseph Cash*, (1902) 86 L. T. 211; *Burgess* v. *Burgess*, (1853) 3 De G. M. & G. 896; *Turton* v. *Turton*, (1889) 42 Ch. D. 128; *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; cp. *Massam* v. *Thorley's Cattle Food Co.*, (1880) 14 Ch. D. 748; *Croft* v. *Day*, (1843) 7 Beav. 84. A trader cannot have any exclusive right to the use of a mere address: *Street* v. *Union Bank of Spain and England*, (1885) 30 Ch. D. 156. *A fortiori*, no one can appropriate an address for purposes unconnected with business: *Day* v. *Brownrigg*, (1878) 10 Ch. D. 294.

(*d*) *Valentine Meat Juice Co.* v. *Valentine Extract Co., Ltd.*, (1900) 83 L. T. 259; *Jameson* v. *Dublin Distillers' Co.*, (1900) 1 Ir. R. 43.

(*e*) *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) A. C. 83.

(*f*) Trade Marks Act, 1905, s. 39. This provision is, however, apart from an order of the Court, restricted to trade marks in use before August 13th, 1875; see s. 19, Act 1905.

(*g*) For recent examples of words that have been held non-registrable, see *Christy* v. *Tipper*, (1905) 1 Ch. 1, C. A. ("Absorbine"); *Hommel* v. *Gebrüder, Bauer & Co.*, (1904) 20 T. L. R. 585 ("Hæmatogen"), S. C., affirmed on appeal, (1904) 21 T. L. R. 81.

names are afforded by the cases of *Ford* v. *Foster* (*a*), and *Burroughs, Welcome & Co.'s* trade-mark, *in re* (*b*), in the former of which the use of the word *Eureka* was allowed as a good trade-mark to a shirt-maker (*c*), and in the latter the word *Tabloid* as a registrable trade-mark for certain productions of a manufacturing chemist. Where, however, the fancy word is no more than a phonetic misspelling of one or more colloquial English words, it will not be regarded as an "invented word" within the meaning of sec. 9 (ss. 4) of the Trade Marks Act, 1905 (*d*). It is not, however, in all cases necessary that the "invented word" should be absolutely new (*e*). But as on the one hand a descriptive word might acquire a secondary signification (*f*), in which it was capable of appropriation, so a fancy word might come to be merely descriptive and the common property of everybody rightfully selling the class of goods which it described. Where a word, originally used only by one trader, is employed by others in the same line of business, the test by which a decision is to be arrived at whether the word has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public; "whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods" (*g*). Everyone may now manufacture Harvey's sauce or Liebig's extract of meat and sell them under those names, such names having come to denote merely a particular kind of sauce or extract, and having ceased to suggest to the purchaser that the

(*a*) (1872) L. R. 7 Ch. 611. The infringement of a fancy name will be restrained without proof of intent to deceive, because the defendant can have had no other intent. See *per* Lord Herschell, *Reddaway* v. *Banham*, (1896) A. C. p. 210.

(*b*) (1904) 91 L. T. 58, C. A.

(*c*) And see *Eastman Photographic Co.* v. *The Comptroller-General of Patents*, (1898) A. C. 571.

(*d*) Replacing s. 10 of the Patents, Designs and Trade Marks Act, 1888, and see "*Uneeda*" *Trade-Mark, In re*, (1902) 1 Ch. 783, C. A., and *Ripley's Trade-Mark, In re*, (1898) 78 L. T. 367, C. A.

(*e*) *Linotype Co.'s Trade-Mark, In re*, (1900) 2 Ch. 238.

(*f*) As to what will and what will not constitute a secondary or special meaning, so as to entitle to registration, see *Cellular Clothing Co.* v. *Maxton*, (1899) A. C. 326; *Louise & Co.* v. *Gainsborough*, (1903) 87 L. T. 591; *Faulder & Co.'s Trade-Mark, In re*, (1902) 1 Ch. 125; and *Hommel* v. *Gebrüder, Bauer & Co.*, (1904) 21 T. L. R. 80, C. A.

(*g*) *Per* Mellish, L.J., *Ford* v. *Foster*, (1872) L. R. 7 Ch. 611, at p. 628.

thing sold comes from the manufactory of the persons by whom the names were first exclusively employed (*a*).

Again, there can be no exclusive proprietary right in a descriptive word that aptly designates the material or substance from which a manufactured article is made. Thus the use of the word "naptha" cannot be monopolised by one soap maker, but may be employed by any one engaged in the soap trade (*b*).

Name of new invention.

When some entirely new invention is brought forward, the designation under which it is introduced to the public is necessarily descriptive, however arbitrarily chosen. Such a designation is not a mere nickname, but the fit and appropriate term to employ in describing the article. Thus where a patent had been taken out for a substance called "Linoleum," it was held that after the patent had expired people other than the patentee might manufacture and sell the same substance under the same name (*c*). This view has, however, upon different facts, been dissented from by the Court of Appeal (Cozens-Hardy, L.J., diss.), in the more recent case of *Cheesebrough's Trade Mark "Vaseline," In re* (*d*).

Mere infringement not easily distinguishable from fraud.

Cases of infringement of a trade-mark were not always easily distinguishable from cases of fraudulent imitation of a trade name or trade description.

In *Wotherspoon* v. *Currie* (*e*), the plaintiff was a starch manufacturer, who had originally carried on his trade at a place with very few inhabitants called Glenfield. This starch was labelled Glenfield starch, and under that name acquired a great reputation. He subsequently transferred his works elsewhere, and the defendant took a portion of the plaintiff's old premises and manufactured starch there, which he also sold as Glenfield starch, using various devices to lead customers to believe that

(*a*) *Lazenby* v. *White*, (1871) 41 L. J. Ch. 354 n.; *Liebig's Extract of Meat Co.* v. *Hanbury*, (1867) 17 L. T. N. S. 298.

(*b*) *Fels* v. *Thos. Hedley & Co., Ltd.*, (1903) 20 T. L. R. 69, C. A.; and see *N. K. Fairbank Co.* v. *Cocoa Butter Manufacturing Co.*, (1903) 20 T. L. R. 53.

(*c*) *Linoleum Manufacturing Co.* v. *Nairn*, (1878) 7 Ch. D. 834. See *per* Fry, J., *Siegert* v. *Findlater*, (1878) 7 Ch. D. at p. 813; *per* Fry, L.J., *Waterman* v. *Ayres*, (1888) 39 Ch. D. p. 38; *per* Stirling, J., *Powell* v. *Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. pp. 456–460.

(*d*) (1902) 2 Ch. 1 C. A.

(*e*) (1872) L. R. 5 H. L. 508.

his was *the* Glenfield starch. The defendant was absolutely restrained from the use of the word Glenfield, to a great extent on the ground that it had become exclusively appropriated to the plaintiff, but great stress was also laid on the fact of the defendant's fraud. It may be that if he had been able to show that he used the word Glenfield in a fair and proper manner to describe his place of business, taking care to distinguish his labels and packages from those of the plaintiff, his conduct would have been justifiable (*a*). Where, however, there is no probability of the public being deceived by the mis-representation, as a general rule no injunction will be granted (*b*).

In *Massam* v. *Thorley's Cattle Food Co.* (*c*) the plaintiff, as executor, carried on the business of one J. Thorley, who had for a long time manufactured by a secret process a material which he sold as Thorley's Food for Cattle. On his death a rival company was started, in which J. W. Thorley, a brother of J. Thorley and possessed of his secret, was a small shareholder and manager. This company sold packages made to resemble those of the plaintiff's, which were labelled "Thorley's Food for Cattle." It was considered in the first place that the plaintiff had a right good against the world in general to the use of the term in question, and that, although this right did not extend so far as to enable him to prevent J. W. Thorley from selling the same food under his own name, yet the latter must not do so fraudulently, in such a manner as to make the public think when purchasing his food that they were getting the manufacture of the plaintiff (*d*).

The separate assignment of the right to use a trade name

Assignment of trade name.

(*a*) See *Thompson* v. *Montgomery*, (1889) 41 Ch. D. 35; *Reddaway* v. *Banham & Co.*, (1896) A. C. 199; and see *Sen Sen Co.* v. *Britten*, (1899) 1 Ch. 692.

(*b*) *Lever Bros., Ltd.* v. *Beddingfield*, 1899) 80 L. T. 100.

(*c*) (1880) 14 Ch. D. 748.

(*d*) The mere fact that the defendant uses his own name will not be evidence of fraud even though the probability is that the public will be occasionally misled by it (*Turton* v. *Turton*, (1889) 42 Ch. D. 128); and see *Montreal Lithographing Co.* v. *Sabiston*, (1899) A. C. 610, P. C., and *Melrose Drover* v. *Heddle*, (1902) 4 F. 1120, Ct. of Sess.; but where he uses a name which is not his name, it may be presumed that he does it to represent the goods he sells as the goods of the person whose name he uses (*Burgess* v. *Burgess*, (1853) 3 De G. M. & G. 896), and the inference will be strengthened if he uses vessels and labels like those of the original firm (*Croft* v. *Day*, (1843) 7 Beav. 84).

unconnected with any business is invalid (*a*). Nor is a trader entitled to register a mark for goods in which he does not deal (*b*).

Assignment of trade-mark.

In the case of a properly registered trade mark, it is provided by s. 38 of the Trade Mark Act, 1905 (*c*), that "Subject to the provisions of this Act (1) The person for the time being entered in the register as proprietor of a trade mark shall, subject to any rights appearing from such register to be vested in any other person, have power to assign the same, and to give effectual receipts for any consideration for such assignment.

Limitations in assignment of trade-marks.

No trade mark may, however, be assigned or transmitted save in connection with the goodwill of the business concerned in the goods for which it was registered, and the right of the assignee is determinable, with the determination of the goodwill (*d*).

Name of company.

Under s. 20 of the Companies Act, 1862, the registration of a company under a name identical with that by which a subsisting company is already registered or so nearly resembling the same as to be calculated to deceive is prohibited (*e*). The

Trade-marks by statute.

statutory right to trade marks, subsequently to April 1st, 1906, depends upon the Trade Marks Act, 1905 (*f*), which consolidates and amends preceding legislation. Under this Act (which replaces 46 & 47 Vict. ch. 57, as amended by 51 & 52 Vict. ch. 50) a register of trade marks is established.

Registration a condition precedent to the institution of proceedings for infringement.

Section 42 of this Act provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, unless such trade mark was in use before the 13th of August, 1875, and has been refused registration under the provisions of the Act, although in such cases the Registrar may on request grant a certificate that registration has been refused.

Who may apply for registration.

Section 12 enacts that any person claiming to be the proprietor of a trade mark, who is desirous of registering the same, may apply

(*a*) *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

(*b*) *Batt* v. *Dunnett*, (1899) A. C. 428; see also *Ashton's Trade-Mark, In Re*, (1900) 48 W. R. 389.

(*c*) 5 Ed. VII. c. 15.

(*d*) 5 Ed. VII. c. 15, s. 22.

(*e*) 25 & 26 Vict. c. 89. See *Hendriks* v. *Montague*, (1881) 17 Ch. D. 638; *Mdme. Tussaud & Sons, Ltd.* v. *Tussaud*, (1890) 44 Ch. D. 678; *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) A. C. 83.

(*f*) 5 Ed. VII. c. 15.

to the Registrar of trade marks for that purpose. And in event of the Registrar absolutely refusing the application, or only accepting it subject to modification, the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving at the same, and such decision shall be subject to appeal to the Board of Trade, or to the Court at the option of the applicant. For the purpose of registration (which must be renewed every fourteen years (s. 28)), if the mark was not in use before August 13th, 1875 (*a*), it must consist of or contain— Effect of absolute or qualified refusal to register.

"(1) The name of a company, individual or firm represented in a special or particular manner; or,

(2) The signature of the applicant for registration or some predecessor in his business; or,

(3) An invented word or invented words (*b*); or,

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or surname (*c*); or,

(5) Any other distinctive mark, but a name, signature, or word, or words, other than such as fall within the descriptions in the above paragraphs (1, 2, 3, and 4), shall not, except by order of the Board of Trade, or the Court, be deemed a distinctive mark."

"Distinctive" when used in connection with a trade mark means that the particular device chosen is adapted to distinguish the goods of the proprietor of the trade mark from those of other persons (*d*). If the mark was in use before August 13th, 1875, it can only be registered— Meaning of "distinctive."

(a) if it consists of a "special or distinctive word or words, letter, numeral, or combination of letters, or numerals, and

(b) has continued to be used (either in its original form or with additions or alterations not substantially affecting the

(*a*) As to when *laches* will disentitle an applicant to costs or to have an infringing trade mark expunged from the register, see *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211.

(*b*) See *ante*, p. 718.

(*c*) For instances of use of geographical name, see *Grand Hotel Co. of Caledonia Springs* v. *Wilson*, (1903) 89 L. T. 456, P. C., and *Clement & Cie's Trade-Mark*, *In re*, (1900) 1 Ch. 114; and *ante*, p. 717.

(*d*) 5 Ed. VII. c. 15, s. 9.

identity of the same) down to the date of the application for registration under the Trade Marks Act, 1905 (*a*).

The Act further provides that along with the trade mark proper may be registered certain other marks and words, as to which there is no exclusive right, provided the applicant states the essential particulars of his trade mark and disclaims those parts as to which he makes no exclusive claim (*b*).

Concurrent user.

In case of honest concurrent user . . . the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods, or description of goods, by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think it right to impose (*c*).

Associated trade-marks.

Where application is made for the registration of a trade mark so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion (if used by a person other than the applicant) the tribunal hearing the application may require as a condition of registration that such trade marks shall be entered on the register as associated trade marks (s. 24).

Combined trade-marks.

If the proprietor of a trade mark claims to be entitled to the exclusive use of any portion of an associated trade mark separately, he is entitled to have the same registered as a separate trade mark (s. 25). Each of such separate trade marks must, however, satisfy all the conditions and thence-forward shall have all the incidents of an independent trade mark, except that when registered it, and the trade mark of which it forms a part, shall be deemed to be associated trade marks, and shall be entered on the register as such. It is further provided by this section (25) that the user of a combined or associated trade mark shall (when belonging to the same

(*a*) 5 Ed. VII. c. 15, s. 9.

(*b*) 5 Ed. VII. c. 15, s. 15. As to what words constitute a "trade-mark" and what words form an "addition" thereto, see *Clement & Cie's Trade-Mark, In re*, (1900) 1 Ch. 114; *Crompton & Co.'s Trade-Mark, In re*, (1902) 1 Ch. 758; *Royal Baking Powder Co.'s Trade-Mark, In re* (1902) 5 W. R. 454; *Bass, Ratcliffe & Gretton's Trade-Mark, In re*, (1902) 2 Ch. 579. As to distinction by colour, see 5 Ed. VII. c. 15, s. 10: and *Hanson's Trade-Mark, In re*, (1887) 37 Ch. D. 112.

(*c*) 5 Ed. VII. c. 15, s. 21.

proprietor) be deemed a user of the several trade marks of which such associated trade mark is made up.

Series of trade-marks.

It is provided by s. 26 of the Trade Marks Act that when a person claiming to be the proprietor of several trade marks (distinctly differing from one another in character for the same description of goods) seeks to register such trade marks, they may be registered as a series in one registration. In such case, however, all the trade marks in a series so registered shall be deemed to be, and shall be registered as associated trade marks.

Assignment of associated trade-marks.

It should be noted that associated trade marks (which term includes combined trade marks, and a series of trade marks) are assignable or transmissible only as a whole and not separately, though for all other purposes they are deemed to have been registered as separate trade marks (s. 27).

User of associated trade-marks.

Where user of a registered trade mark is required to be proved for any purpose, the tribunal may (in its discretion) accept user of an associated trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for such user (s. 27). Sections 66 & 67 deal with the falsification of entries in the register of trade marks, and penalise any one falsely representing that a trade mark is registered; and s. 68 prohibits an unauthorised assumption of the Royal Arms. Other sections of the Act deal with the advertisements requisite before insertion on the register (*a*), and to opposition to an application for the registration of a trade mark (*b*). The apportionment of trade marks on the dissolution of partnership is also dealt with (*c*). Whilst yet other sections treat of the correction (*d*), alteration (*e*), and rectification (*f*) of the register; the registration of assignments, etc. (*g*), "special trade marks" (*h*), and the powers and duties of the Registrar of trade marks (*i*).

International and colonial trade-marks.

The registration of foreign and colonial trade marks is governed by ss. 103 and 104 of the Patents, Designs, and

(*a*) s. 13.
(*b*) s. 14.
(*c*) s. 23.
(*d*) s. 32.
(*e*) s. 34.
(*f*) s. 35.
(*g*) s. 33.
(*h*) ss. 62 *sqq.*
(*i*) ss. 58 *sqq.*

Trade Marks Act, 1883, (as amended by the Patents, Designs, and Trade Marks (Amendment) Act, 1885), and the orders in Council made thereunder (*a*).

Fraudulent trade-marks not protected.

Apart from any statute, no one can claim to be protected in the use of a trade-mark, name, or description, which is a fraud on the right of another trader, or a deception on the public, or used as an instrument of dishonest trading (*b*). The Act provides that no trade-mark shall be registered which is identical with a mark already registered with respect to the same description of goods, or having such resemblance to it as to be calculated to deceive (*c*), nor "any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice," nor "any scandalous design" (*d*).

The Court will not accede to an application for registration which is made with the object of getting the benefit of an old fraudulent user (*e*). And where there has been a concurrent user of a trade name or mark by more than one person, and one of the users has allowed it to fall into desuetude, he may not again revive its use to the prejudice of his former co-users (*f*).

Public user.

The trade-mark or other right for which protection is claimed must in cases outside the statute have been publicly known and recognised in connection with some particular class of goods. Where there is no established reputation there can be no injury (*g*). A very short time, however, may suffice to make a trade-mark or name recognised in a market (*h*). Apparently, however, in cases outside the statute protection will generally be granted, even though the plaintiff is unable to show, in addition to an established reputation for his own goods, something

(*a*) 5 Ed. VII. c. 15, s. 65; and see *In re Californian Fig Syrup Co.'s Trade-Mark*, (1888) 40 Ch. D. 620.

(*b*) See *Marshall* v. *Ross*, (1869) L. R. 8 Eq. 651; *Ford* v. *Foster*, (1872) L. R. 7 Ch. 611; *Lee* v. *Haley*, (1869) L. R. 5 Ch. 155; *Chearin* v. *Walker*, (1877) 5 Ch. D. 850.

(*c*) ss. 11 and 19.

(*d*) 5 Ed. VII. c. 15, s. 11. See *In re Dunn's Trade-Marks*, (1889) 41 Ch. D. 439.

(*e*) *In re Fuente's Trade-Marks*, (1891) 2 Ch. 166.

(*f*) *Daniel & Arter* v. *Whitehouse*, (1898) 1 Ch. 685.

(*g*) *Goodfellow* v. *Prince*, (1887) 35 Ch. D. 9; see *Schove* v. *Schmincke*, (1886) 33 Ch. D. 546; *Licensed Victuallers' Newspaper Co.* v. *Bingham*, (1888) 38 Ch. D. 139.

(*h*) *M'Andrew* v. *Bassett*, (1864) 33 L. J. Ch. 561.

amounting to an actual intention to deceive on the part of the defendant (*a*).

Registration is *primâ facie* evidence, and registration for seven years conclusive evidence, of exclusive right to the trade-mark, subject to the provisions of the Act (*b*). Where, however, a trade-mark, applicable to an entire class of goods, though registered for more than the prescribed period, has been dormant with regard to certain goods pertaining to the class, it is liable to be expunged from the register, in relation to those particular commodities in respect of which it has not been used (*c*). Prior to the passing of the Act of 1905 it was held that the last words of s. 76 of the Act of 1883 left it open to any defendant in an action for infringement, at any time after registration, to contest a trade-mark on the ground that it ought never to have been registered (*d*); in view of ss. 41 and 11 of the New Act this contention is, however, in the absence of fraud, obviously no longer tenable. The registration appears only conclusive as to what has happened subsequently thereto (*e*). In cases outside the Act a party may lose his right by non-user and abandonment, or by permitting the trade-mark to become common property (*f*). A trade-mark can only be registered for particular goods or classes of goods (*g*). Registration.

As already stated (*h*), a person is not entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade-mark. When right dependent on registration.

Trade names which existed before the first registration Act do not by reason of the limitations introduced by statute, lose the protection which the law, as it then stood, gave them.

(*a*) *Weingarten* v. *Bayer*, (1905) 92 L. T. 811, H. L., reversing the decision of the Court of Appeal, reported (1903) 89 L. T. 56.

(*b*) 5 Ed. VII. c. 15, s. 41. This bar does not apply when the mark is one which should never have been registered at all. See *Baker* v. *Rawson*, (1890) 45 Ch. D. p. 531.

(*c*) *Hart's Trade-Mark, In re*, (1902) 2 Ch. 621.

(*d*) *Re J. B. Palmer's Application*, 1882) 21 Ch. D. 47; *Re J B. Palmer's Trade-Mark*, (1883) 24 Ch. D. 504; *Re Wragg's Trade-Mark*, (1885) 29 Ch. D. 551.

(*e*) See *Mouson & Co.* v. *Boehm*, (1884) 26 Ch. D. 398; and see *supra* as to Concurrent User.

(*f*) See above, p. 719.

(*g*) 5 Ed. VII. c. 15, s. 8, and see *ante*, p. 714.

(*h*) See p. 722, and 5 Ed. VII. c. 15, s. 42. As to International and Colonial Trade-Marks, see 5 Ed. VII. c. 15, s. 65, and *ante*, p. 725.

No infringement where no deception.

It is clear alike at common law and by statute (*a*) that where a person has no exclusive right in a trade-mark he cannot be injured, unless that of which he complains is (apart from any question of intention) likely to deceive. Probably, however, in the case of trade-marks in which the right is said to be exclusive, the mere user of the appropriated mark will of itself amount to an infringement, the effect of recent legislation apparently being to create a vested proprietary right in the owner of a trade-mark analogous in character to that possessed by the absolute possessor of any other description of personal property (*b*). Consequently, in order to justify an injunction it is not necessary to adduce instances in which deception has occurred, "the law is content with proof of acts likely to deceive" (*c*).

Powers of registered owner.

Deception of ultimate purchaser.

It is not necessary, however, that it should be shown that there was any likelihood of deception towards the immediate purchasers. A trade-mark or description is calculated to deceive if it is sent forth attached to or impressed on the goods in such a manner as is likely to mislead those members of the general public who may become the ultimate purchasers (*d*). A manufacturer must not only beware of deceiving his own customers; he must not put into their hands that which may become an instrument of deception to others (*e*). It is no answer to a complaint of misrepresentation to say that an observant person who made careful examination would not be misled. The test is the impression likely to be produced on the casual and unwary customer (*f*).

Innocent infringement

Prior to recent legislation it remained a somewhat doubtful

(*a*) Trade Marks Act, 1905, s. 15, and see *Faulder & Co.'s Trade-Mark, In re*, (1902) 1 Ch. 125, C. A.

(*b*) 5 Ed. VII. c. 15, s. 38, sub-ss. 1, 2.

(*c*) *Jay* v. *Ladler*, (1888) 40 Ch. D. p. 656. See also *per* Lindley, L.J., *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. p. 644.

(*d*) See 5 Ed. VII. c. 15, s. 45, as to "Passing Off" actions.

(*e*) *Wotherspoon* v. *Currie*, (1872) L. R. 5 H. L. 508; *Johnston* v. *Orr-Ewing*, (1882) 7 App. Cas. 219. As to fraudulent appropriation of testimonials, see *Tallerman* v. *Dowsing Radiant Heat Co.*, (1900) 1 Ch. 1; S. C. in C. A., 69 L. J. Ch. 46. As to misuse of testimonials by representing those obtained for one article as having been gained for another and totally distinct commodity, see *F. King & Co.* v. *Gillard & Co.*, (1905) 2 Ch. 7, C. A.

(*f*) *Per* Lord Selborne, *Singer Manufacturing Co.* v. *Loog*, (1882) 8 App. Cas. p. 18. See *Hookham* v. *Pottage*, (1872) L. R. 8 Ch. 91; cp. *Civil Service Supply Association* v. *Dean*, (1879), 13 Ch. D. 512; and see *Panhard et Levassor* v. *Panhard et Levassor Motor Co.*, (1901) 2 Ch. 513.

point whether an action for damages would lie for the infringement of a trade-mark, save in cases where the defendant had acted with knowledge of the plaintiff's claim. The Act of 1905, however, tends to remove this uncertainty. Where, however, there is a proved continuous user by an unregistered person or his predecessors in business of a trade-mark, for specific goods, from a date anterior to that at which another person registered the same mark, for similar goods, in compliance with statutory requirements, it is expressly provided (s. 41, paragraph 2) that nothing in the Act of 1905 shall entitle the proprietor of the registered mark to object (upon proof of user) to such other person being also put upon the register. And thenceforward the right of user in both will be concurrent. The courts of common law originally made no distinction between cases of infringement of a trade-mark and ordinary cases of fraudulent imitation of a trade name or description. In both alike it was considered that the intent to deceive was an essential element of the wrongful act (*a*). In *Crawshay* v. *Thompson* (*b*) the defendants had used a trade-mark resembling that of the plaintiff, and on their attention being called to the matter had refused to desist. It was held that the plaintiff must prove, not merely that the defendants' trade-mark was so like his own as to be calculated to deceive, but that the defendants had used it with the intention of supplanting him, and that the mere fact that the defendants were aware of the resemblance did not necessarily give him a cause of action (*c*).

Common law rule.

Where fraud was once proved the plaintiff was entitled to a verdict, even though he did not prove any actual damage. His right, it was said, was necessarily injured (*d*).

The courts of equity intervened by injunction to prohibit the continuance of any conduct or practice, whether by infringement of trade-mark or otherwise, which was likely to deceive the public, and thus unfairly divert to one trader the custom intended for another (*e*). Apparently, however, in all cases, the

Equity rule.

(*a*) *Payton* v. *Snelling*, (1901) A. C. 309.

(*b*) (1842) 4 M. & G. 357.

(*c*) *Lever Bros., Ltd.* v. *Bedingfield* (1899) 80 L. T. 100.

(*d*) *Blofield* v. *Payne*, (1833) 4 B. & Ad. 410.

(*e*) *Hookham* v. *Pottage*, (1872) L. R. 8 Ch. 91.

gist of the action was the intent to deceive (*a*). They also, in all cases where fraud had been practised, would make the offending party refund the profits which he had made by reason of his fraud. But in cases of infringement of trade-mark it was said that the rule went further, and that, even where the imitation was innocent and unintentional, the party could not only be restrained as to the future, but made to pay compensation as to the past. In *Millington* v. *Fox* (*b*), which for the first time laid down the rule that a non-fraudulent infringement must be restrained by injunction, it seems to have been assumed as a corollary that in such a case an account of the profit made by reason of the infringement might be ordered. In a later case it was said that if a man had made use of another's trade-mark, although he had acted innocently at the time, yet when the mistake was discovered, he ought to be made to refund profits which had in fact been made at the expense of another's right. "If he seeks to keep in his pocket profits which he has made by representing, however innocently, that his goods are another person's, after he has been told of the fact, it is fraud" (*c*). It is, however, one thing to say that a man shall not be permitted to carry on a practice when once its unfairness has been pointed out to him, another to make him pay damages for that which he did while his ignorance continued. In *Edelsten* v. *Edelsten* (*d*) Lord Westbury, while granting an injunction to restrain an infringement of a trade-mark, refused to grant an inquiry as to the profits made by the defendant through the infringement previously to his attention having been directed to it. In the later case of *Reddaway* v. *Bentham Hemp-spinning Co.* (*e*) it was assumed by Smith, L.J., that fraud was essential to a claim for damages.

In what sense a trade-mark a property.

The ground on which it is said that damages may be given for an infringement of a trade-mark without proof of fraud, or even of knowledge, is that the right, being exclusive in its nature, is a right of property, and that where a right of property is infringed

(*a*) *Parsons* v. *Gillespie*, (1898 A. C. 239.

(*b*) (1837) 3 My. & Cr. 338.

(*c*) *Per* Page-Wood, V.-C., *M'Andrew* v. *Bassett*, (1864) 33 L. J. Ch. p. 564. This seems hardly consistent with the decision in *Derry* v. *Peek*, (1889) 14 App. Cas. 337.

(*d*) (1863) 1 De G. J. & S. 185.

(*e*) (1892) 2 Q. B. p. 648.

the motive or knowledge of the infringing party are immaterial (*a*). It cannot, however, be said to be a universally true proposition that a damage to the subject-matter of a right is an injury to the right itself. A trade-mark is indeed by statute invested with the various attributes of property. An injury to it is not a mere personal wrong, but in case of death will pass to the personal representative (*b*). It is both by the general law and statute capable of assignment, not, however, as a separate subject-matter, but only in connection with the goodwill of the business concerned in the goods for which it has been registered and is determinable with that goodwill (*c*). Yet a trade name, which bears some analogy to a trade mark, but which has never been said to be property, exactly speaking, is assignable in the same way (*d*). It is besides not strictly true that the right in a trade-mark is exclusive. A man might have a trade-mark good as against A. and not good as against B. (*e*). A trade-mark, therefore, although it may be a property, is property in a peculiar sense, and it does not seem a necessary consequence, apart from the obvious trend of recent legislation, that an infringement should be treated on the same principle as a trespass to land or goods.

The statutory necessity for registration, although it does not in terms alter the nature of the right in a trade-mark does nevertheless make it more definite and exclusive. Whether or no this fact has any bearing on the question of liability for innocent infringement is a matter to be deduced by implication rather than from the express words of the statute. The registration of a trade-mark at any rate interposes an additional difficulty in the way of persons who endeavour to plead their ignorance of its existence.

(*a*) This appears to be the view of Lord Cairns: *Singer's Machine Manufacturers* v. *Wilson*, (1876) 3 App. Cas. p. 391.

(*b*) *Oakey & Sons* v. *Dalton*, (1887) 35 Ch. D. 700.

(*c*) 5 Ed. VII. c. 15, s. 22; and see *Hall* v. *Barrows*, (1863) 4 De G. J. & S. 150; 46 & 47 Vict. c. 57, s. 70; and see *Batt* v. *Dunnett*. (1899) A. C. 428.

(*d*) *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

(*e*) *Burgess* v. *Burgess*, (1853) 3 De G. M. & G. 896.

CHAPTER XXII.

OFFICERS OF JUSTICE.

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Judicial and ministerial acts.

OFFICERS of courts of justice act either judicially or ministerially. A judicial act is one which involves the exercise of a discretion, in which something has to be heard and decided. A ministerial act is one which the law points out as necessary to be done under the circumstances, without leaving any choice of alternative courses. Every purely formal step in a legal process, and everything which is necessary to carry into execution what has been judicially decided, is ministerial.

It is not always easy to exactly distinguish between the two classes of acts. If application is made to a magistrate to issue a distress warrant against a defaulting ratepayer, he has jurisdiction to inquire as to whether the rate has been duly made and published, and as to whether it has been paid, but if satisfied on these points, he is bound to issue his warrant, and cannot deal with any question of rateability (*a*). The issuing of the warrant, therefore, is a ministerial act, though the preliminary inquiry is a judicial act (*b*). On this analogy it was sought in *Linford* v. *Fitzroy* (*c*) to recover damages against a magistrate in an action for unreasonably refusing to take bail in a case of misdemeanour; and it was contended that, though the magistrate might have a

(*a*) In case of tender of part payment, the magistrate may, *in his discretion*, issue his warrant in respect of the non-tendered part only: *Rex* v. *Gillespie*, (1904) 1 K. B. 174. And see Wiles, *Ex parte*, (1903) 20 T. L. R. 150.

(*b*) See below, p. 744.

(*c*) (1849) 13 Q. B. 240.

judicial discretion as to the sufficiency of the bail tendered, yet when this preliminary condition was satisfied his duty became simply ministerial. The Court, however, held the duty could not be thus split and divided, and that it must be treated as purely judicial. In *Garnett* v. *Ferrand* (*a*) it was held that a coroner in ordering a person to be excluded from his court was acting judicially (*b*).

Judicial acts.

And first as to judicial acts. Responsibility depends not upon the particular office which the party holds, but upon the function which he performed on the occasion in question.

Different notions on this subject seem to have prevailed formerly. Thus Holt, C.J., in *Groenvelt* v. *Burwell*, says: "Commissioners of bankrupts may commit a man for refusing to be examined concerning the estate of the bankrupt, but they are not judges, and their proceedings are traversable" (*c*). But in *Doswell* v. *Impey* (*d*) it was held that such commissioners were entitled to the full protection of the judicial position (*e*). Subordinate officers of courts of justice, many of whose duties are ministerial, frequently act judicially as well, and on the other hand magistrates, who are the judges of courts of summary jurisdiction, have also certain ministerial functions. Thus, the assembly of licensing justices at brewster sessions is not a court of summary jurisdiction, there being no *lis* and no controversy *inter partes* (*f*); apparently, however, the *confirming* authority is (*g*).

Different kinds of courts.

In considering the responsibility for judicial acts it is necessary to bear in mind, first, the distinction between courts of record and courts not of record, and, secondly, between the Supreme Court and courts of limited jurisdiction. Courts of record

(*a*) (1827) 6 B. & C. 611.

(*b*) See too as to the distinction between a judicial and ministerial act, *Ward* v. *Freeman*, (1852) 2 Ir. C. L. R. 460, in which case the Irish Exchequer Chamber were equally divided as to whether a county judge on receiving notice of appeal acted judicially or ministerially.

(*c*) (1699) Lord Raym. p. 467.

(*d*) (1823) 1 B. & C. 163, overruling *Miller* v. *Seare*, (1777) 2 W. Bl. 1141.

(*e*) So also the General Council of Medical Education appear to be acting judicially in investigating a charge of infamous conduct in a professional respect brought against a medical practitioner: *Allbutt* v. *The General Council of Medical Education and Registration*, (1889) 23 Q. B. D. 400.

(*f*) *Boulter* v. *Kent Justices*, (1897) A. C. 556.

(*g*) *Reg.* v. *Manchester Justices*, (1899) 1 Q. B. 571.

include the Supreme as well as various inferior courts. The essential feature of such courts is that their proceedings can be proved only by their own official record, and that their judges possess the power to punish for contempt of court. Judges of the Supreme Court may punish for contempt wherever committed. Judges of inferior courts of record can only deal with contempt in the face of the Court itself (*a*). Judges not of record have no judicial power in respect of contempts as such, though they may direct the removal of persons disturbing their proceedings; and have jurisdiction to bind over the offender in recognizances to be of good behaviour.

Abuse and absence of jurisdiction distinguished.

If an act purporting to be judicial is alleged as a legal wrong, the plaintiff may seek to establish his case in two ways: first, on the ground that, although the act was within the scope of the authority given by law, it was not an honest exercise of discretion, but on the contrary proceeded from corrupt, malicious, or other improper motives; secondly, on the ground that the act in question was not a judicial act at all, but a pure tort committed under the colour of judicial authority. The cause of action may be either an abuse of jurisdiction, an absence of jurisdiction, a disqualifying interest tending to a real likelihood of bias and consequent abuse of justice (*b*), or a disregard of, or a misapprehension as to, the ordinary rules of procedure (*c*).

Abuse of jurisdiction of court of record.

It is well settled that no action lies in respect of any mere abuse of jurisdiction of a court of record (*d*). The reason for this appears to be that it is a less evil that corrupt or malicious judges should be protected than that honest judges should be exposed to the risk of frivolous and vexatious proceedings.

Of court not of record.

With respect to courts not of record, it is assumed in a great many cases that an action on the case will lie in respect of the damage caused by

(*a*) *Reg.* v. *Lefroy*, (1873) L. R. 8 Q. B. 134. As to county courts, see 51 & 52 Vict. c. 43, s. 162

(*b* *Rex* v. *Sunderland Justices*, (1901, 2 K. B. 357, C. A. As to what constitutes reasonable likelihood of bias, see *Rex* v. *Tempest*, (1902) 86 L. T. 585; *Reg.* v. *Waterford Justices*, (1901) 2 Ir. R. 548; *Wilder, Ex parte*, (1902) 66 J. P. 761. A justice by retaining a solicitor to oppose a licensing application is not thereby disqualified from hearing and determining the application as a member of the licensing authority, *Rex* v. *Dublin Justices*, (1904) 2 Ir. 75.

(*c*) *Rex* v. *Zossenheim* (1903) 20 T. L. R. 121; *Rex* v. *Kettle*, (1905) 1 K. B. 212.

(*d*) *Floyd* v. *Barker*, (1607) 12 Rep. p. 23; *per* Lord Mansfield, C.J., *Mostyn*

a wrongful (*a*) and malicious judicial decision (*b*), and 11 & 12 Vict. c. 44, s. 1, is framed on the supposition that such is the state of the law. In *Gelen* v. *Hall* (*c*) the question was directly raised whether a count in a declaration alleging malicious and unreasonable conviction of the plaintiff by the defendant as a magistrate disclosed any cause of action; but the Court refused to decide it, and sent the action for a new trial on another point.

There does not, however, seem to be any reason for making a distinction between courts of record and courts which are not of record with regard to the liability of their judges for any abuse of jurisdiction of which they may be guilty. On grounds of policy and convenience both classes are entitled to equal protection, and in a recent case (*d*) it was held that the judge of a consular court, which was not a court of record, was entitled to the same degree of protection as is accorded to a judge of a court of record by English law.

Absence of jurisdiction

If a judicial person acts outside the limits of his jurisdiction, he is, in effect, not acting as a judge at all. His official character is no protection to him, and he is responsible for the consequences of what he does, just as a private individual might be. In this respect there is no difference between judges of one kind and another. There is, however, a very important practical distinction between judges of the Supreme Court and judges of limited jurisdiction. The former have to determine what the limit of their jurisdiction is, and, therefore, can never be said to exceed their authority, unless, indeed, they act without any show or colour of right (*e*). If they erroneously assume jurisdiction there is no power which can correct them except the Legislature. But the lawfulness of the proceedings of an inferior court is open to inquiry in the Supreme Court (*f*). A party, therefore, who

v. *Fabrigas*, (1774) 1 Cowp. p. 172; *Fray* v. *Blackburn*, (1863) 3 B. & S. 576; *Anderson* v. *Gorrie*, (1895) 1 Q. B. 668.

(*a*) *Polley* v. *Fordham*, (1904) 2 K. B. 345; S. C. (1904) 20 T. L. R. 639.

(*b*) *Burley* v. *Bethune*, (1814) 5 Taunt. 580; *Taylor* v. *Nesfield*, (1854) 3 E. & B. 724; *Kirby* v. *Simpson*, (1854) 10 Ex. 358; *per Cur.*, *Care* v. *Mountain* (1840) 1 M. & G. p. 263; *Linford* v. *Fitzroy*, (1849) 13 Q. B. 240.

(*c*) (1857) 2 H. & N. 379.

(*d*) *Haggard* v. *Pelicier Frères*, (1892) A. C. 61.

(*e*) *Taaffe* v. *Downes*, (1812) 3 Moore, P. C. 36, n.

(*f*) On *mandamus* if jurisdiction has been improperly declined, on *certiorari* if an illegal order has been made, on

complains of having suffered a wrong under a judgment or order of an inferior judge has a practical means of testing the validity of the act of which he complains. Jurisdiction may be wrongly assumed through error of law or fact.

And where it appears upon the face of the summons, that a justice has no jurisdiction in a matter, yet, nevertheless, in spite of the want of jurisdiction he proceeds to adjudicate and convicts (such conviction being afterwards set aside on appeal), the mere fact of the lack of jurisdiction not being brought to the justice's notice at the time of the hearing of the summons is immaterial.

It being provided by section 2 of The Justices Protection Act 1848 (*a*) that where a justice of the Peace does an act without or exceeding his jurisdiction proceedings will lie against him without alleging that the act complained of was done maliciously and without probable cause (*b*).

Error of law. Absence and excess of jurisdiction.

1. With regard to error in law, a distinction is sometimes made between absence of jurisdiction and excess of jurisdiction. If on the facts before him a judge has no competence to deal with the matter at all and nevertheless does so, he acts without jurisdiction; if, having authority to deal with it on one footing, he deals with it on another, he acts in excess of jurisdiction. An excess of jurisdiction is simply an absence of jurisdiction as to part of the proceedings.

Thus it is an excess of jurisdiction for a judge, in a trial without jury, to deprive a successful party of costs (*c*).

Absence of jurisdiction.

(a) There may be an entire absence of jurisdiction from the very nature of the case dealt with, as if; prior to the passing of the Burglary Act, 1896, a court of quarter sessions should take on itself to try a man for burglary, or at the present day should try a man on a capital charge, or, a county court judge should try an action of libel, or adjudicate on the infringement of a registered trade mark (*d*); or from the fact that on the face of the proceedings it appears that the necessary conditions precedent have not been complied with. Thus, where a statute directed that a summons

prohibition if jurisdiction has been improperly assumed.

(*a*) 11 & 12 Vict. c. 44.

(*b*) *Polley* v. *Fordham*, (1904) 91 L. T. 525.

(*c*) *Civil Service Co-operative Society, Ltd.* v. *The General Steam Navigation Co.*, (1903) 2 K. B. 756, C. A.

(*d*) *Bow* v. *Hart*, (1905) 1 K. B. 592, C. A.

should be served on the party charged ten days at least before the hearing, and the plaintiff, being summoned for a day within the appointed time, neglected to attend, and in his absence was convicted and imprisoned, it was held that the whole proceedings were void and the magistrate liable for the imprisonment (*a*). In *Jones* v. *Gurdon* (*b*) the plaintiff had been proceeded against under a statute empowering a justice of the peace to summon a party against whom a complaint had been made to appear before him, and, on appearance, to hear and determine the matter. The defendant, not being the justice before whom the information had been originally laid, convicted the plaintiff, who under this conviction was imprisoned. It was held that the defendant was liable, since the only person who had jurisdiction in the matter was the justice issuing the summons. A defect of jurisdiction may, however, be cured by appearance (*c*) but not by appearance under protest (*d*).

But there is no power in a Court or a judge to order the issue of a writ of *habeas corpus* directed to a person who, at the date of the order, is out of the jurisdiction (*e*).

So, if a justice issues a warrant in the first place to apprehend on a charge of an indictable offence, without a sworn information in writing, he is answerable for the arrest under the warrant, although he had good oral evidence before him, since by 11 & 12 Vict. c. 42, s. 8, an information in writing is a necessary condition of the jurisdiction to issue a warrant (*f*).

(b) The cases in which the question of excess of jurisdiction most frequently arises are those in which the error consists not in wrongly entertaining a matter, but in dealing with it in the wrong way. If a man is put on his trial for one offence and convicted of another, or if he is convicted of one offence and punished for another, the conviction in the one case, and the

Excess of jurisdiction.

(*a*) *Mitchell* v. *Foster*, (1840) 12 A. & E. 472; and see *Reg.* v. *Cockshott*, (1898) 1 Q. B. 582.

(*b*) (1842) 2 Q. B. 600.

(*c*) *Reg.* v. *Hughes*, (1879) 4 Q. B. D. 614; *Moore* v. *Gamgee*, (1890) 25 Q. B. D. 244.

(*d*) *Dixon* v. *Wells*, (1890) 25 Q. B. D. 249.

(*e*) *Rex* v. *Pinckney*, (1904) 2 K. B. 84, C. A.

(*f*) *Lawrenson* v. *Hill*, (1859) 10 Ir. C. L. R. 177, see *Caudle* v. *Seymour*, (1841) 1 Q. B. 889. For other instances of absence or ouster of jurisdiction, see *Rex* v. *French*, *Roberts*, *Ex parte*, (1902) 1 K. B. 637; *Rex* v. *Londonderry Justices*, (1902) 2 Ir. R. 266; *Kinnis* v. *Graves*, (1898) 78 L. T. 502.

commitment in the other, are altogether bad (*a*). In *Davis* v. *Capper* (*b*) it was held that if a magistrate remanded a prisoner for an unreasonable time he rendered himself liable to an action of false imprisonment, his power being to remand only for such time as was reasonable (*c*). There is power to commit a party summoned for a breach of the peace, but a committal of such party until he find sureties without any further limitation of time is altogether bad (*d*). In *Leary* v. *Patrick* (*e*) the plaintiff had been convicted and ordered to pay a penalty, but the order was silent as to costs. A distress warrant was issued for the amount of the penalty and costs, and under it certain chattels of the plaintiff were seized. The plaintiff recovered in trespass for the taking of his goods. In cases of civil debt recoverable before a court of summary jurisdiction, an order of justices for payment cannot be enforced by imprisonment in default of distress without proof that the defaulter has had the means to pay between the making of the order and the issue of the warrant (*f*).

Moreover, the decision of a court on a question which is beyond its statutory jurisdiction is not *res judicata* and cannot therefore be pleaded as an estoppel (*g*).

Mere irregularity does not destroy jurisdiction.

Irregularity of procedure does not create a defect of jurisdiction. Thus if the presiding magistrate gives a decision without properly consulting his brother justices, the decision is still good in law (*h*). In *Bott* v. *Ackroyd* (*i*) the justices convicted the plaintiff in a penalty and costs; the conviction and warrant were drawn up and signed by them with a blank for the amount of costs, which was afterwards filled up by the clerk. It was held that this was an erroneous exercise and not an excess of jurisdiction, and that no action lay against the justices in respect of proceedings taken under the warrant (*k*).

(*a*) *Reg.* v. *Brickhall*, (1864) 33 L. J M. C. 156; *Rogers* v. *Jones*, (1824) 3 B. & C. 409.

(*b*) (1829) 10 B. & C. 28.

(*c*) Remands where an indictable offence is charged are now regulated by 11 & 12 Vict. c. 42, s. 21, and 42 & 43 Vict. c. 49, s. 24.

(*d*) *Prickett* v. *Gratrex*, (1846) 8 Q. B. 1020; see also *Clark* v. *Woods*, (1848) 2 Ex. 395.

(*e*) (1850) 15 Q. B. 266.

(*f*) *Gamble, In re*, (1899) 1 Q. B. 305; *Reg.* v. *Truscott*, (1899) 81 L. T. 188.

(*g*) *Toronto Railway* v. *Toronto Corporation*, (1904) A. C. 809.

(*h*) *Penney* v. *Slade*, (1839) 5 Bing. N. C. 319.

(*i*) (1859) 28 L. J. M. C. 207.

(*k*) See too *Ratt* v. *Parkinson*, (1851) 20 L. J. M. C. 208.

In *Ackerley* v. *Parkinson* (*a*) the plaintiff had been excommunicated in the Ecclesiastical Court, for contumacy. The excommunication was afterwards set aside on appeal, on the ground that the citation served upon the plaintiff was altogether void. He thereupon brought an action on the case against the judge of the Court. It was held, however, that the action would not lie, insomuch as the Court had possessed general jurisdiction in the matter, and the absence of a proper citation was a mere irregularity. It seems difficult to distinguish this case from *Mitchell* v. *Foster* (*b*). There, as has been seen, the absence of a proper summons was held fatal, though there was a general jurisdiction over the subject-matter.

Error of fact.

2. It may be a question of fact whether jurisdiction exists or not, and this question may arise in respect of the very issue that is to be decided by the Court, or in respect of some subordinate or collateral matter.

In the actual decision.

(a) Of course, in one sense, no person in a judicial position is entitled to make an order which the facts do not justify, but, if his jurisdiction were made to depend on the correctness of his inferences, the result would be that in all cases he would be liable for a mere erroneous exercise of his judgment. The true test, however, is to inquire whether, assuming that the charge or other matter alleged before him is true, he has jurisdiction to deal with it (*c*). Thus, while a trespass involving a title to land, if founded on "a fair and reasonable supposition" of right, is not within the jurisdiction of justices, a conviction for a similar offence committed in assertion of an altogether untenable and absurd claim involves no ouster of jurisdiction, and will be affirmed upon appeal (*d*). It is a fallacy to say that "the fact which the magistrate has to decide is that which constitutes his jurisdiction. . . . Suppose the case of a conviction under the game laws for having partridges in possession; could the magistrate, in an action of trespass, be called upon to show that the

(*a* (1815) 3 M. & S. 411.

(*b*) (1840) 12 A. & E. 472; see above, p. 737.

(*c*) *Per Cur.*, *Cave* v. *Mountain* (1840) 1 M. & G. p. 262; *Polley* v. *Fordham*, (1904) 2 K. B. 345; *Reg.* v. *Bolton*, (1841) 1 Q. B. 66; see *Ashcroft* v. *Bourne*, (1832) 3 B. & Ad. 684; *Lowther* v. *The Earl of Radnor*, (1806) 8 East, 113.

(*d*) *Brooks* v. *Hamlyn*, (1899) 79 L. T. 734.

bird in question was really a partridge?" (*a*). The decision of any court on a matter which by law it is appointed to decide is conclusive, except in so far as an appeal may lie, and if the judge of an inferior court has come to such a decision the superior court cannot reopen the question in any action brought against him (*b*). It makes no difference if the inferior court have acted without legal evidence, or adopted an irregular procedure (*c*). If, however, there has been no hearing or inquiry at all then the superior court will intervene, for no decision can stand where the elementary forms of justice have not been observed. Where the judge of an inferior court, by a premature exhibition of animus, unduly biases the jury, or prevents counsel from cross-examining witnesses, a writ of *certiorari* or of prohibition will issue, ousting the jurisdiction of the original tribunal and removing the case into the High Court (*d*).

Error of fact in collateral matter.

(b) The objection to the jurisdiction may arise not on the main issue but on some collateral point which may be brought to the attention of the Court. Thus, it may be alleged that the matters in question arose outside the local limits within which the Court has authority, or that there is a dispute of title which will oust its jurisdiction. In such cases the Court has, before proceeding further, to decide this preliminary question. Its decision on this matter is not final, as is a decision on the merits, but will be reviewed in the superior court on *certiorari* prohibition, or *mandamus* (*e*). The inferior court cannot give itself jurisdiction by an erroneous finding of facts (*f*).

(*a*) *Per* Richardson, J., *Brittain* v. *Kinnaird*, (1819) 1 B. & B. p. 442.

(*b*) *Kemp* v. *Neville*, (1861) 10 C. B. N. S. 523; *Brittain* v. *Kinnaird*, (1819) 1 B. & B. 432.

(*c*) *Cave* v. *Mountain*, (1840) 1 M. & G. 257; *Ex parte the Overseers of Tollerton*, (1842) 3 Q. B. 792; *Kemp* v. *Neville*, *supra*.

(*d*) *Crabb & Others* v. *Lee & Others*, Times Newspaper, Jan. 26, 1904.

(*e*) *Thompson* v. *Ingham*, (1850) 14 Q. B. 710; *Liverpool Gas Co.* v. *Everton*, (1871) L. R. 6 C. P. 414; *per Cur.*, *Bunbury* v. *Fuller*, (1853) 9 Ex. p. 140. The case of *Reg.* v. *Dayman*, (1857) 7 E. & B. 672, illustrates the difficulty which sometimes arises in determining whether a decision is on the merits or on a collateral point.

(*f*) It is said in *Brown* v. *Cocking*, (1868) L. R. 3 Q. B. 672, that the superior Court has no jurisdiction to interpose where the inferior Court has decided on conflicting evidence a question of jurisdiction. It seems, however, in such cases rather a rule of convenience, that the Court which has not had the witnesses before it should accept the finding of the Court which has, just as the Court of Appeal may refuse under like circumstances to overrule a judge

Knowledge of absence of jurisdiction.

A judge who acts without jurisdiction is not liable unless he had "knowledge or means of knowledge, of which he ought to have availed himself, of that which constitutes the defect of jurisdiction" (*a*). He is always supposed to know the law, and therefore it is no defence to plead that he acted wrongly through mistake of law (*b*). But the facts of the case on which jurisdiction depends may not be brought before the Court at all, or, if brought, the evidence with respect thereto may be doubtful and conflicting. Thus it is apparently uncertain whether or no the word "Court" in sect. 4 of the Arbitration Act, 1889 includes a County Court (*c*). In such case the judge is not answerable even though in fact the jurisdiction did not exist. The defect must be one of which he ought to have known. The evidence before him must have been such as to lead any reasonable mind to the conclusion that there was an absence of jurisdiction (*d*). Whether in such a case it lies on the plaintiff to prove the absence of reasonable and probable cause or on the defendant to prove its presence seems undecided (*e*).

If *primâ facie* it appears that jurisdiction has been assumed through a mistake of law it is for the defendant to prove, if he can, that the mistake was in truth one of fact. In *Houlden* v. *Smith* (*f*) the defendant was a county court judge, and judgment had been given in one of his courts against the plaintiff, who resided at Cambridge, out of the jurisdiction. The plaintiff was afterwards served with a judgment summons in which his residence was described as of Cambridge, and an order was made

of first instance. The Superior Court cannot well lose its jurisdiction to inquire into facts simply because such inquiry will be difficult. See *per* Blackburn, J., *Elston* v. *Rose*, (1868) L. R. 4 Q. B. p. 8.

(*a*) *Per* Parke, B., *Calder* v. *Halket*, (1839) 3 Moore, P. C. p. 77.

(*b*) *Houlden* v. *Smith*, (1850) 14 Q. B. 841. In the old case of *Hamond* v. *Howell*, (1677) 2 Mod. 218, the defendant was the Recorder of London, and he had fined and imprisoned the plaintiff for misconduct as a juror in returning a wrong verdict. The Court held that the action did not lie because the defendant had general jurisdiction to punish misconduct in jurors, although he took an erroneous view of what was such misconduct. The mistake here was one of law, but in the very issue to be decided and not in a collateral matter.

(*c*) *Runciman & Co.* v. *Smyth & Co.*, (1904) 20 T. L. R. 625.

(*d*) *Pike* v. *Carter*, (1825) 3 Bing. 78; *Pease* v. *Chaytor*, (1861–3) 1 B. & S. 658; 3 B. & S. 620.

(*e*) The cases of *Calder* v. *Halket*, (1839) 3 Moore, P. C. 28, and *Carratt* v. *Morley*, (1841) 1 Q. B. 18, appear in conflict on this point.

(*f*) *Supra*.

for his imprisonment. This was without jurisdiction, since he ought to have been proceeded against at Cambridge. The Court declined to assume in the absence of evidence that the mistake was one of fact, as to the plaintiff's real residence, and not of law, as to the extent of the jurisdiction.

Remedy for act done without jurisdiction.

If a judicial person is liable at all for acting without jurisdiction the ordinary remedy is trespass for any invasion of person or property which may have been committed by the officers or agents of the law in obedience to the unauthorised decision (*a*). The mere fact that the party against whom an order has been made has been put to expense in getting it quashed does not appear to be of itself a cause of action (*b*). If an order is partly within the jurisdiction and partly without, the party making it is not answerable for what is done in carrying it into effect, provided that the bad part has not been acted upon. Thus in *Barton* v. *Bricknell* (*c*) the defendant had convicted the plaintiff in a penalty and costs, and directed that in default of sufficient distress he should be put in the stocks. There was no jurisdiction to inflict the stocks, and the order was quashed in consequence. Meantime a distress had been levied, and the plaintiff sued the defendant in respect of the distress. It was held, however, that though the conviction was bad as a whole yet, since the defendant had jurisdiction to order a distress, he was protected.

Setting aside proceedings.

It is a general rule that the proceedings of any court, which are regular on the face of them and which have not been subsequently set aside or quashed (*d*), are a sufficient justification for any act done in pursuance of their authority (*e*). If, however,

(*a*) See, however, the observations of Blackburn, J., in *Pease* v. *Chaytor*, (1861) 1 B. & S. p. 674, with reference to jurisdiction assumed on mistake of fact; and as to what will oust jurisdiction, see *Pickavance* v. *Pickavance*, (1901) P. 60; *Kinnis* v. *Graves*, (1898) 78 L. T. 502. See also *Polley* v. *Fordham*, (1904) 2 K. B. 345, S. C. (2) (1904) 91 L. T. 525.

(*b*) *Somerville* v. *Mirehouse*, (1860) 1 B. & S. 652. This seems to be the ground on which the decision of Hill, J., in this case proceeded.

(*c*) (1850) 13 Q. B. 393. The punishment of the stocks for drunkenness was repealed by the Licensing Act, 1872. Apparently it is still unrepealed as a punishment for Sunday trading: 29 Chas. II. c. 7, s. 2, sub-s. 5, but see 34 & 35 Vict. c. 87, renewed by 3 Edw. VII. c. 40.

(*d*) See *Polley* v. *Fordham*, *supra*.

(*e*) *Basten* v. *Carew*, (1825) 3 B. & C. 649; *Brittain* v. *Kinnaird*, (1819) 1 B. & B. 432.

the setting forth of such proceedings discloses any fatal defect, then being a mere nullity they are not available as a defence (*a*). The record though it may not be traversed may be demurred to. However, with regard to convictions before magistrates, the law now stands on a special footing (*b*).

Liability of judicial officer for manner of execution.

A judicial person is only answerable for the strict consequences of any order or judgment which he may give; he has no general responsibility for the manner in which the ministerial officers of the Court execute its process. Even where special bailiffs are appointed, their mistake or misconduct does not affect him if such appointment is according to the ordinary practice of the Court (*c*). But where the steward of a court baron entrusted an attachment to bailiffs named by a party to the cause, taking an indemnity, instead of to the regular officers, it was held that he was liable for their conduct in seizing the goods of the wrong person (*d*).

Statutory protection of justices.

Acts within jurisdiction.

The statute 11 & 12 Vict. c. 44, contains a variety of enactments for the better protection of justices of the peace in the execution of their office. It is provided by s. 1 that when a justice of the peace is sued for an act done within his jurisdiction it shall be a necessary allegation on the part of the plaintiff that such act was done maliciously and without reasonable and probable cause (*e*).

Acts without jurisdiction.

In respect of acts without jurisdiction, or in excess of jurisdiction, a conviction or order unquashed on appeal or *certiorari* is an answer to any action brought in respect of what has been done, whether under a warrant issued before such conviction or order, to procure the attendance of the party, or subsequently in obedience to the conviction or order. If the warrant is issued to procure the attendance of a party and is not followed by any conviction or order, or is upon an information for an indictable offence, the justice is still protected in respect of anything done under the warrant, though he acted without jurisdiction, provided he first issued a summons to the party, and there was a failure to appear (*f*) either in person or by his

(*a*) *Crepps* v. *Durden*, (1777) 2 Cowp. 640 *Mitchell* v. *Foster*, (1840) 12 A. & E. 472.

(*b*) See pp. 743 *sqq*.

(*c*) *Tunno* v. *Morris*, (1835) 2 C. M. & R. 298.

(*d*) *Bradley* v. *Carr*, (1841) 3 M. & G. 221.

(*e*) See above, pp. 695 *sqq*.

(*f*) s. 2.

counsel or solicitor (*a*). This last provision does not cover the case of a justice who after conviction, and for its better enforcement, issues a summons to the party convicted to show cause why he should not be committed in default of payment of a fine or obedience to an order. Non-appearance to such a summons will not protect a justice who thereupon issues an illegal warrant (*b*). It is to be noticed that under this section the justice is in a better position where a conviction or order has not followed the arrest than where it has. In the latter case the section only protects him while the conviction or order stands good, in the former case the non-appearance to a previous summons is a good answer.

Warrants in pursuance of previous order.

By s. 3, where a justice, *bonâ fide* and without collusion, grants a warrant of distress or commitment, in pursuance of an order or conviction made by some other justice, he is absolutely protected, and the remedy, if any, is against the first justice. Formerly such a protection did not exist where there was a defect apparent on the face of the order or conviction, because such a defect gave notice of the absence of jurisdiction (*c*).

Distress warrants.

By s. 4, "where any poor-rate shall be made, allowed and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect of the said rate or by reason of such person not being liable to be rated therein." Justices in issuing distress warrants for rates have only jurisdiction to inquire whether the party against whom the application is made has discharged himself of his liability to pay. They have no jurisdiction to inquire whether he was originally liable at all. In cases of tender of part payment of rates, they may, *in their discretion*, issue the warrant for the untendered part only (*d*). If, however, they grant a warrant for a rate which was never legally due, they are not protected by their judicial character, and in cases not coming under the

(*a*) *Bessell* v. *Wilson*, (1853) 1 E. & B. 489.

(*b*) *Ibid.*; and see *Gamble, In re*, (1899) 1 Q. B. 305.

(*c*) *Newman* v. *The Earl of Hardwick*, (1838) 8 A. & E. 124.

(*d*) *Rex* v. *Gillespie*, (1904) 1 K. B. 174; *Wiles, Ex parte*, (1904) 90 L. T. 225.

section in question are clearly liable to an action of trespass for any seizure made under their warrant (*a*). But they have a discretion to grant or refuse the warrant, and for that purpose they may consider whether there is reasonable ground to doubt the validity of the rate (*b*); and if necessary they may state a case for the determination of the points on which their doubts have arisen (*c*). What difference in their favour the section makes does not seem clear. In one case it was said that it would have no application if a warrant were issued to distrain the goods of a person who had no rateable property in the parish for which the rate was made. "The fourth section clearly would not protect the justice if he acts without jurisdiction" (*d*). The prudent course, therefore, for justices, where the liability is doubtful, is to refuse to act, and to leave the overseers to apply for a *mandamus* to compel them to issue the warrant. In respect of anything which may be done in obedience to a *mandamus* they are protected by s. 5.

Orders affirmed on appeal.

By s. 6 no action shall be brought against a justice in respect of anything done under any warrant issued by him on a defective order or conviction, if the order or conviction has been affirmed on appeal.

Limitation of action.

By the Public Authorities Protection Act, 1893 (*e*), the action must be brought within six months after the act complained of (*f*).

Ministerial acts.

A ministerial act may consist either in the carrying out of some formal step of procedure, or in the execution of the orders and judgments of a court of justice.

Formal steps of procedure.

No liability is incurred by an official who simply forwards the process of the Court in the ordinary course of business, without exercising any judgment of his own in the matter. It is nothing to him that the process itself is ill-founded or illegal. If a magistrate backs a warrant to be executed within his jurisdiction,

(*a*) *Newbould* v. *Coltman*, (1851) 6 Ex. 189; *Pedley* v. *Davis*, (1861) 10 C. B. N. S. 492.

(*b*) *Per Cur.*, *Pedley* v. *Davis*, at p. 510.

(*c*) *Fourth City Mutual Building Society* v. *Churchwardens, &c., of East Ham*, (1892) 1 Q. B. 661.

(*d*) *Per* Patteson, J., *Reg.* v. *Justices of Great Yarmouth*, (1850) 4 New Sess. Cas. p. 315.

(*e*) 56 & 57 Vict. c. 61; see above, p. 178.

(*f*) As to when time begins to run against the plaintiff, see *Polley* v. *Fordham*, (1904) 2 K. B. 345.

which has been illegally issued in the first instance, the remedy of the party arrested under such warrant is not against the magistrate who backed it but against the magistrate by whom it was issued (*a*). In *Dews* v. *Riley* (*b*) the judge of a county court having made an invalid order of commitment, the defendant as clerk of the court made out a warrant in pursuance of the order under which the plaintiff was arrested. It was held that the defendant was not liable insomuch as he was, in accordance with his duty, simply putting into form an order of his superior officer, which he had no power to review, and consequently the issue of the warrant was not his act but the act of the judge. Where, however, the judges of an inferior court having jurisdiction to order payment of a debt in instalments, and, upon proof of default in payment, to award imprisonment, made an order for payment by instalments "or execution to issue" and left it to their clerk to subsequently issue execution on proof of default; without further intervention of the Court, it was held that the clerk in so doing was not acting ministerially, but on the contrary taking on himself an unauthorised judicial function, and was therefore liable for the consequences (*c*).

Failure to carry out step of procedure.

It would seem that any official who wrongfully neglects to carry out any step of procedure which a party is entitled to require of him, is liable to the person so aggrieved for any damage which may be proved to have resulted. In the Irish case of *Ward* v. *Freeman* (*d*), where a county court judge was sued for refusing to receive notice of appeal in an action depending before him, the Court, while divided in opinion on the question whether the reception of the notice was a ministerial act, were agreed that, assuming it to be such, an action would lie. Judgments formerly bound the land of the judgment debtor, and if the officer whose duty it was to properly record judgment neglected in any case to do so, he was "liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up" (*e*).

(*a*) *Clark* v. *Woods*, (1848) 2 Ex. 395.
(*b*) (1851) 11 C. B. 434.
(*c*) *Andrews* v. *Marris*, (1841) 1 Q. B. 3.
(*d*) (1852) 2 Ir. C. L. R. 460.
(*e*) *Per* Lord Mansfield, C.J., *Douglas* v. *Yallop*, (1759) 2 Burr. p. 722: cp. *Robinson* v. *Gell*, (1852) 12 C. B. 191.

Executive acts.

Under ordinary circumstances the execution of the process of the courts rests with a special class of ministerial officers—in the superior courts with the sheriffs in their respective jurisdictions, in the county courts with the high bailiffs or the registrars (*a*). The other inferior courts of record generally have executive officers known as serjeants-at-mace.

Order of inferior court does not always protect executive officer.

The legal position of all appears to be substantially the same, except in one particular. An order of a superior court is in all cases a protection to the officer executing it so long as he does not exceed his mandate, and he is not bound to take notice of any defect or irregularity attending the process, even though obvious and apparent (*b*). There is, indeed, one case in which the sheriff is bound to prove the validity of the judgment under which he acts. If a judgment debtor has assigned chattels in fraud of his creditors, and the sheriff seizes under a writ of *fi. fa.*, he cannot rely simply on his writ but must prove the judgment, for except as against a creditor the assignment is good, and the sheriff commits a trespass if there is no valid judgment debt (*c*). This, however, is an apparent, not a real exception to the general rule, the sheriff in such case being liable not because the judgment is bad, but because he has seized the wrong person's goods. But the order of an inferior court is not of itself, at common law, a conclusive protection to the officer acting under it. He is bound to scan the terms of the order, and if it appears on the face of it to be such as the Court could not legally make, he is not justified in putting it in force, since he is supposed to know the law, and, therefore, to be aware that the document is a mere nullity (*d*). If the order be good upon the face of it, he is fully protected in its due execution, even though he may be aware that under the circumstances of the case it was illegally issued. Where a prisoner who had been wrongfully arrested, was delivered to a gaoler under a good warrant, it was said by the Court "that if he

(*a*) 51 & 52 Vict. c. 43, ss. 33–7.

(*b*) *Countess of Rutland's Case*, (1605) 6 Rep. 53; *Brown* v. *Watson*, (1871) 23 L. T. N. S. 745. As to the protection afforded to the governor of a gaol by the warrant of commitment, see *Henderson* v. *Preston*, (1888) 21 Q. B. D. 362; but see *Demer* v. *Cook*, (1903) 88 L. T. 629.

(*c*) See *White* v. *Morris*, (1852) 11 C. B. 1015.

(*d*) *Andrews* v. *Marris*, (1841) Q. B. 3; *Carrat* v. *Morley*, (1841) 1 Q. B. 18; *Watson* v. *Bodell*, (1845) 14 M. & W. 57.

had been informed of the tortious taking (without being of the covin, or practising therein) he ought, nevertheless, to detain the prisoner, being delivered to him with a good warrant for arrest, though the execution of it was illegal; for if such information had been false, and the gaoler had set the prisoner at large, he had been liable to be sued for the escape" (*a*).

Where a statute expressly provided that officers acting in obedience to the order of an inferior court should be indemnified against the consequences, it was held that this language covered the case of obedience to an order which appeared upon the face of it to have been made without jurisdiction (*b*).

County court executions.

In county court executions the authority of the Court is sufficiently proved by the production of the warrant under the seal of the Court, and the officers levying the execution are protected notwithstanding "any defect of jurisdiction or other irregularity in the said warrant" (*c*). They do not become trespassers *ab initio* by any irregularity in the course of the execution but are liable for the special damage caused thereby (*d*).

Responsibility for subordinates.

The responsibility of the sheriff or other executive officer is not merely that of putting the process of the Court in due train for being executed, he is absolutely liable in every respect for the conduct of the subordinates whom he must necessarily employ (*e*). Whatever they do, however lawlessly, or however contrary to orders, is imputable to him, provided it was done as part of the execution. Thus where, under an execution in the county court, goods belonging to a third party (entitled to immediate possession) were seized and sold, the bailiff was held liable in trover to the owner (*f*). Again in *Smart* v. *Hutton* (*g*) a writ of *fi. fa.* had been taken out against the plaintiff. The sheriff's officer, not finding sufficient goods to satisfy the amount endorsed, took him into custody, and it was held that the sheriff was liable for the false imprisonment. On the same principle, though ordinarily *delegatus non potest delegare*, the sheriff is answerable for the acts

(*a*) *Per Cur.*, *Olliet* v. *Bessey*, (1682) T. Jones, p. 214.

(*b*) *Saffery* v. *Jones*, (1831) 2 B. & Ad. 598.

(*c*) 51 & 52 Vict. c. 43, ss. 52, 54–5.

(*d* s. 52.

(*e*) As to county court bailiffs, see 51 & 52 Vict. c. 43, s. 85.

(*f*) *Jelke* v. *Hayward*, (1905) 2 K. B. 460.

(*g*) (1833) 8 A. & E. 568, n.

of the depnty appointed by his officer (*a*). But he is not liable if the act of the bailiff is not under colour of the writ, or done in the pretended execution of it. It was accordingly held that a sheriff could not be charged with a breach of duty because the bailiff had not paid over money received in discharge of a judgment debt from a party arrested on a *ca. sa.*, it being the bailiff's duty simply to make the arrest and not to receive the money (*b*).

Special bailiffs.

If, however, the sheriff appoints a special bailiff at the instance of a party concerned in an execution, such party cannot complain of any particular act of misconduct on the part of his own nominee (*c*). He does not, however, free the sheriff from his general responsibility towards him in the matter (*d*). So, if a party induces a bailiff in any way to act contrary to his duty, he cannot afterwards be heard to complain of that particular breach of duty, but he may bring his action in respect of any other misconduct of the officer by which he may have suffered damage (*e*). Thus, where an execution debtor persuaded a sheriff's officer to postpone a sale of the goods seized, his interference did not disentitle him from recovering the loss caused by the careless conduct of the sale itself (*f*).

Duty of execution officer.

The sheriff or other officer charged with the execution of the process of a Court has a duty towards the party at whose instance the process issues, and the party against whom it is issued. He has a duty also towards the trustee in bankruptcy and towards the landlord of the execution debtor. He is liable, moreover, for any act not covered by the authority of the process, and which by itself is a trespass or conversion (*g*).

It will be convenient to consider the various successive steps of an execution, pointing out the liability which may arise upon each.

(*a*) *Gregory* v. *Cotterell*, (1855) 5 E. & B. 571.

(*b*) *Woods* v. *Finnis*, (1852) 7 Ex. 363. See also *Smith* v. *Pritchard*, (1849) 8 C. B. 565.

(*c*) *De Moranda* v. *Dunkin*, (1790) 4 T. R. 119. As to what amounts to procuring the appointment of a special bailiff, *Ford* v. *Leche*, (1837) 6 A. & E. 699; *Bailson* v. *Meggat*, (1836) 4 Dowl. P. C. 557; *Alderson* v. *Darenport* (1844) 13 M. & W. 42.

(*d*) *Taylor* v. *Richardson*, (1800) 8 T. R. 505.

(*e*) *Cook* v. *Palmer*, (1827) 6 B. & C. 739: *Botten* v. *Tomlinson*, (1847) 16 L. J. C. P. 138; *Crowder* v. *Long*, (1828) 8 B. & C. 598.

(*f*) *Wright* v. *Child*, (1866) L. R. 1 Ex. 358.

(*g*) *Jelks* v. *Hayward*, (1905) 2 K. B 460.

Making inquiry.

The sheriff or other officer is, in the first place, bound to make inquiry as to the presence of the debtor (*a*) or his property within the limits of the bailiwick, and he has no right to demand information of the execution creditor as a condition precedent to taking action (*b*). He must next proceed to enter into possession or arrest, as the case may be. A sheriff must provide himself with such force as to overcome any resistance which may be reasonably anticipated (*c*), but he is not liable if the process is defeated by reason of unexpected contingencies (*d*). An execution ought to proceed without unreasonable delay, but there is no obligation to act at the very earliest moment possible; what is reasonable is a question of fact for the jury under the particular circumstances of each case (*e*). In *Hooper* v. *Lane* (*f*) the sheriff having in his hands two writs, one valid and the other invalid, arrested a party under the invalid writ, being guilty of negligence in so doing. In consequence the party was discharged from custody and left the country before there was time to re-arrest him under the valid writ. It was held that the creditor whose writ had thus been defeated had good cause of action against the sheriff. The creditor may, after process is delivered, suspend the execution, and while the suspension continues there is no authority to act in the matter (*g*).

Seizure and arrest.

Right of entry.

An Englishman's house his castle.

It is lawful to enter upon the house or land of an execution debtor in order to search for and seize his person or property, according to the nature of the execution. But a special sanctity attaches to the dwelling-house, which is an Englishman's castle, and may not be broken open, even after demand of admittance made and refused. In many of the old cases it is said that the sheriff may only enter if the door be open, and accordingly it is laid down that he is a trespasser if he goes in by lifting the

(*a*) Imprisonment for debt was abolished by 32 & 33 Vict. c. 62, but s. 4 makes certain exceptions. By s. 6, arrest on mesne process is abolished except in certain cases when the defendant is about to quit the country.

(*b*) *Dyke* v. *Duke*, (1838) 4 Bing. N. C. 197.

(*c*) See 50 & 51 Vict. c. 55, s. 8.

(*d*) *Howden* v. *Standish*, (1848) 6 C. B. 504; *Hodgson* v. *Lynch*, (1871) Ir. Rep. 5 C. L. 353.

(*e*) *Brown* v. *Jarvis*, (1836) 1 M. & W. 704; *Hobson* v. *Thelluson*, (1867) L. R. 2 Q. B. 642.

(*f*) (1856) 6 H. L. C. 443.

(*g*) *Barker* v. *St. Quintin*, (1844) 12 M. & W. 441.

latch (*a*), but this has been questioned (*b*). He may enter by lifting a window partially open, for this would not be a breaking even in burglary (*c*). Any outbuilding not adjoining or being part of a dwelling-house may be forced (*d*).

Not to protect strangers.

"The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed to his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore, in such cases, after denial on request made, the sheriff may break the house" (*e*). However, he enters at his peril, whether he does so peaceably or not. He has no right of entry for the purpose of search, but is only justified if the person whom he desires to arrest or the goods which he desires to seize are in the house (*f*).

Inner doors.

If an entry has once lawfully been made through the outer door it is lawful, without demand or refusal, to break open inner doors subsequently for the purpose of making a seizure or arrest, and it would seem for the purpose of making search (*g*).

Who is a stranger.

According to the principle laid down in *Semayne's Case* a man is not to be regarded as a stranger to a house if he is ordinarily resident there, although he is not the occupier, nor are his goods to be regarded as a stranger's goods if they are ordinarily deposited there. There is, therefore, in such cases on the one hand, a right of search after peaceable entry, on the other hand a protection against forcible entry. In *Cooke* v. *Birt* (*h*) the plaintiff sued the sheriff for breaking and entering his house. The defendant justified under a writ of *fi. fa.*, directing him to seize any goods which were in the hands of the plaintiff's wife as

(*a*) Com. Dig. Execution, C. 5. See too *Curtis* v. *Hubbard*, (1841) 1 Hill's Rep. New York, 336.

(*b*) *Per Cur.*, *Ryan* v. *Shilcock*, (1851) 7 Ex. p. 77.

(*c*) See *Crabtree* v. *Robinson*, (1885) 15 Q. B. D. 312; a case of distress.

(*d*) *Penton* v. *Brown*, (1664) 1 Sid. 186: *Hodder* v. *Williams*, (1895) 2 Q. B. 663.

(*e*) *Semayne's Case*, (1604) 5 Rep. p. 93.

(*f*) *Morrish* v. *Murrey*, (1844) 13 M. & W. 52.

(*g*) *Hutchison* v. *Birch*, (1812) 4 Taunt. 618; see *Lee* v. *Gansel*, (1774) 1 Cowp. 1.

(*h*) (1814) 5 Taunt. 765.

administratrix, and alleged that having good reason to suspect that there were in the plaintiff's house goods liable to be seized under the writ, he entered peaceably through an open door to search for them, and it was held that the plea was good, because the plaintiff's house was the place in which the property in question might be supposed to be. In *Sheers* v. *Brooks* (*a*), which was a case of a bail seeking to arrest his principal, it was said there was no difference between a house of which a man was possessed and one in which he resided by the consent of another. In *Lee* v. *Gansel* (*b*) it was held that a lodger was not entitled to the protection of the inner door of his room, and assumed that he was entitled to the protection of the outer door.

Forcible re-entry.

Where a lawful entry has been effected and the officer is expelled, he may forcibly break in again without any previous demand (*c*); and so, where there has been a rescue or escape, in order to effect a recapture. On this principle a sheriff's officer, having arrested a party by touching him through a hole in a window, was held justified in afterwards breaking in to enforce the arrest (*d*).

So it is apprehended that if a man in possession goes out for some mere temporary purpose, he does not thereby abandon the execution (*e*), and may, if need be, forcibly re-enter (*f*).

Writ of possession.

One of the resolutions in *Semayne's Case* (*g*) is that "when any house is recovered by any real action or by *Eject' firmæ* the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere facias seisinam* or *possessionem*, &c., and after judgment it is not the house in right and judgment of law of the tenant or defendant" (*h*).

Effect of tortious entry.

An arrest made by reason of a tortious entry is altogether void, and the party is entitled to his discharge, but if, under the like circumstances goods have been seized, the execution, it would seem, stands good in favour of the creditor (*i*).

(*a*) (1792) 2 H. Bl. 120.

(*b*) *Supra*, p. 751.

(*c*) *Aga Kurboolie Mahomed* v. *The Queen*, (1843) 4 Moore, P. C. 239.

(*d*) *Sandon* v. *Jervis*, (1858) E. B. & E. 935.

(*e*) *Ackland* v. *Paynter*, (1820) 8 Price, 95.

(*f*) See *Bannister* v. *Hyde*, (1860) 2 E. & E. 627, which, however, was a case of distress.

(*g*) (1604) 5 Rep. p. 92.

(*h*) As for ejectment in the county court, see 51 & 52 Vict. c. 43, ss. 142–4.

(*i*) *Per* Parke, B., *Percival* v. *Stamp* (1854) 9 Ex. pp. 171–2.

Execution on Sunday.

By 29 Car. II. c. 7, s. 6, all executions made on a Sunday in civil matters are illegal and void. The statute only applies to the original execution; there may be, after an escape or rescue, a lawful retaking on a Sunday (*a*). Where an execution creditor had procured the arrest of his debtor on a Sunday on a criminal charge, whereby the debtor was detained until Monday, and then upon his discharge was at once arrested on a *ca. sa.*, it was held that the latter arrest having been made by means of the former, must be considered as within the prohibition of the statute (*b*).

Hour of execution.

There is no restriction at common law as to the time of day during which process may be executed (*c*). However, in county court ejectments entry can only be made between the hours of nine in the morning and four in the afternoon (*d*).

Privilege from execution.

If any process be executed within a privileged place, or on a privileged person, the process will be set aside on application to the Court, but no action will lie against those who acted in obedience to a lawful writ or order. Such privilege rests on general grounds of public policy, and, therefore, though it will be enforced by release of the person or property seized, there is no individual grievance to be remedied by action. "In all the cases of privilege, whether on the ground of the person being a member of the Legislature, or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the commands of the writ, and that the privileged party must apply to the Court for his discharge. The same principle applies to goods which are protected" (*e*). It makes no difference if it be alleged that the execution was made maliciously and with knowledge of the facts constituting privilege, for where no right is infringed malice is immaterial (*f*).

Privilege of ambassadors.

However, with regard to ambassadors and their servants the

(*a*) *Atkinson* v. *Jameson*, (1792) 5 T. R. 25.

(*b*) *Wells* v. *Gurney*, (1828) 8 B. & C. 769.

(*c*) *Per* Lord Campbell, C.J., *Brown* v. *Glenn*, (1851) 16 Q. B. p. 257.

(*d*) 51 & 52 Vict. c. 43, s. 142.

(*e*) *Per* Alderson, B., *Rideal* v. *Fort*, (1856) 11 Ex. p. 852.

(*f*) *Magnay* v. *Burt*, (1843) 5 Q. B. 381. The privilege is that of the Court, not of the person; therefore, the remedy in such case is to apply to have the party making the arrest or seizure punished for contempt: *per Cur.*, *ibid.*, p. 395.

privilege is absolute, since, by 7 Anne, c. 12, all process against them is null and void to all intents and purposes.

Execution against liquidating companies.

By the joint effect of ss. 85, 87, 163, of 25 & 26 Vict. c. 89, no execution can be put in force, *i.e.*, no seizure can be made under a *fi. fa.* (*a*) against a company after the commencement of its winding-up in Court, unless the leave of the Court has been first obtained. If no such leave has been granted it would seem that the entry and the seizure are respectively trespasses, for the words of the Act are that the execution shall be void to all intents and purposes. No action, however, seems ever to have been brought by a liquidator in respect of any such trespass. The practice is to obtain an order from the Court, in which the liquidation proceedings are pending, for the withdrawal of the execution, and in some cases where such application has been made the Court has ratified and allowed the continuance of a proceeding which was void to all intents and purposes in its inception (*b*).

Responsible officer must be present at execution.

The responsible officer entrusted with the writ must personally attend to supervise its execution (*c*), otherwise there is no legal process, and it is to be presumed that he should have the writ with him, according to the analogy of procedure in criminal cases (*d*).

Party wrongfully arrested must be discharged.

The right of a party arrested in a wrongful or irregular manner to his discharge is absolute as against those who are responsible for the arrest. If a debtor has been taken under a void writ the creditor cannot afterwards sue out a writ which is good, and justify under it a continuance of the imprisonment. If a sheriff has two writs to execute and one is bad, and he arrests under it, he cannot detain under the other. In both cases the right of the debtor is to be discharged, and having been discharged he may subsequently be arrested. But the fact of wrong having been committed does not affect the right of a stranger to that wrong to pursue his legal remedy, and he may execute his process

(*a*) *In re London & Devon Biscuit Co.*, (1871) L. R. 12 Eq. 190.

(*b*) *Re Bastow & Co.*, (1867) L. R. 4 Eq. 681; *Ex parte North Staffordshire R. Co.*, (1874) L. R. 19 Eq. 60. See Buckley on the Companies Acts, 6th ed. pp. 234–8.

(*c*) *Rhodes* v. *Hull*, (1857) 26 L. J. Ex. 265.

(*d*) *Codd* v. *Cabe*, (1876) 1 Ex. D. 352.

wherever the party can be found, whether in custody or out of custody (*a*).

With regard to executions against lands under writs of *elegit*, no question arises as to the sheriff's duty, insomuch as he has not actually to take possession, but after holding inquiry to give the creditor a right of entry, leaving to him the responsibility of enforcing it. *Elegit.*

The lawfulness of a seizure of goods under a writ of *fi. fa.* depends partly on the nature of the goods themselves, partly on the nature of the debtor's interest in them. *Fi. fa.*

A leasehold being a chattel interest may be seized and sold, but it is not the duty of the sheriff or other executive officer to give the purchaser possession, he has simply to enter, sell and assign; and if he continues on the premises afterwards he is a trespasser as against the execution debtor, provided the latter has remained in actual possession (*b*). What chattels may be taken. Leaseholds.

Crops which are raised from year to year by the labour of man's hands—*fructus industriales*—are regarded as chattels even while they are still in the soil, but not so the permanent growth of the land such as grass and fruit. The former may therefore be taken under a *fi. fa.*, the latter not (*c*). However, by 56 Geo. III., c. 50, no growing crop, which by covenant with his landlord a tenant is bound to consume on the premises, can be sold under an execution except subject to the covenant, provided that notice be given. Crops.

As a general rule fixtures may not be seized under a *fi. fa.*; but all which a tenant has a right to remove as against his landlord may be taken in execution against the former (*d*). Fixtures.

Money, notes, bills, and other securities may be taken in execution (*e*). The actual coins, which are appropriated and set apart in the hands of a third person for the debtor, are liable to seizure, but a mere debt is not (*f*). Money, notes, &c.

(*a*) *Humphery* v. *Mitchell*, (1836) 2 Bing. N. C. 619; *Eggington's Case*, (1853) 2 E. & B. 717; *Hooper* v. *Lane*, (1856) 6 H. L. C. 443.

(*b*) *Playfair* v. *Musgrove*, (1845) 14 M. & W. 239.

(*c*) *Per* Bayley, J., *Evans* v. *Roberts*, (1826) 5 B. & C. p. 832.

(*d*) *Dumergue* v. *Rumsey*, (1863) 2 H. & C. 777; *Winn* v. *Ingilby*, (1822) 5 B. & Ald. 625.

(*e*) 1 & 2 Vict. c. 110, s. 12; 51 & 52 Vict. c. 43, s. 147.

(*f*) *Wood* v. *Wood*, (1843) 4 Q. B. 397; *Brown* v. *Perrot*, (1841) 4 Beav. 585.

Clothes, bedding and tools.

The wearing apparel and bedding (including bedstead) (*a*) of any judgment debtor or his family, and the tools and implements of his trade (*b*) to the value of five pounds, are protected from execution (*c*).

Rolling stock.

Protection is likewise given to the rolling stock of railway companies (*d*).

Things out of possession.

It seems clear that if the present right of possession of goods has been parted with by the owner, whether by way of pledge, letting or lien, such goods cannot be seized in an execution against him; for the seizure would be an act of trespass against the possessor (*e*). On the other hand, if the execution debtor has a present right of possession amounting to a special property that interest can be seized and sold (*f*). In the case of heir-looms, the vendor or pawner cannot convey to the vendee or pawnee a larger property in the goods than he himself possesses (*g*). The mere sale does not affect the right of the owner of the reversion, because it does not pass his property, but if there be a sale in market overt, then the reversionary estate is injured and the owner has a cause of action (*h*). In the same way if the execution debtor is tenant in common or joint tenant of any goods, they may be taken in execution for his debt and his interest in them sold, and the other owners can sue in trover only if by reason of a sale in market overt or otherwise they are entirely ousted. The sheriff becomes their co-owner, and is only liable for acts which as between co-owners are tortious (*i*). Goods held by a debtor under a lien cannot be taken in execution; for the lien is a mere personal right and not a property capable of transfer (*k*).

(*a*) *Davis* v. *Harris*, (1900) 1 Q. B. 729.

(*b*) A sewing-machine hired by the wife of a judgment debtor on the instalment system is an implement of trade: *Masters* v. *Fraser*, (1902) 85 L. T. 611.

(*c*) 8 & 9 Vict. c. 127, s. 8; 51 & 52 Vict. c. 43, s. 147. They are similarly protected against distress issued by a Court of Summary Jurisdiction, see 42 & 43 Vict. c. 49, s. 21 (2).

(*d*) 30 & 31 Vict. c. 127, s. 4; 38 & 39 Vict. c. 31.

(*e*) *Rogers* v. *Kennay*, (1846) 9 Q. B. 592.

(*f*) *Per* Parke, B., *Legg* v. *Evans*, (1840) 6 M. & W. p. 42.

(*g*) *Studdert* v. *West*, Law Times, Feb. 15th, 1902, p. 353.

(*h*) *Tancred* v. *Allgood*, (1859) 4 H. & N. 438.

(*i*) *Johnson* v. *Evans*, (1844) 7 M. & G. 240; see *Mayhew* v. *Herrick*, (1849) 7 C. B. 229. See above, pp. 247 *sqq.*

(*k*) *Legg* v. *Evans*, (1840) 6 M. & W. 36.

Equity of redemption.

A mere equity of redemption even though coupled with possession is not the subject of a legal execution (*a*).

When a receiver of rents is appointed by a mortgagee, the mortgagor ceases to have a legal power of distraint (*b*); although a person having authority, express or implied, to distrain for rent due to the legal reversioner, may justify as bailiff to such legal reversioner, if he distrains as for rent due to himself (*c*).

Property held in representative capacity.

If a man is sued in a representative capacity as executor or administrator the writ of execution is directed against the goods of the deceased, and it is clear that such a writ will not justify the seizing of the execution debtor's own goods. Conversely, if in an execution against a man personally, goods are seized which he holds in a representative capacity or in trust, the act is not justified by the writ, and he may sue in trespass or trover (*d*).

In case of a *devastavit*.

It was held, however, in *Quick* v. *Staines* (*e*), where a married woman was executrix, and she and her husband had appropriated to their own use the testator's goods, that in an action by her against the sheriff for seizing those goods in an execution against the husband, she was estopped from setting up her title as executrix.

Goods in custody of the law.

If a man's goods have been distrained they are in the custody of the law and cannot be taken in execution (*f*). If officers with concurrent jurisdictions have severally executions against the same defendant, the one first in possession is, of course, entitled to keep them as against the other (*g*). But by 51 & 52 Vict. c. 43, s. 152, in questions of priority between County Court and High Court executions, the right to the goods is to depend not upon the date of seizure, but upon the times respectively when the writ was delivered to the sheriff or application was made to the County Court Registrar for the issue of his warrant.

(*a*) *Scarlett* v. *Hanson*, (1883) 12 Q. B. D. 213; *Scott* v. *Scholey*, (1807) 8 East, 467.

(*b*) *Woolston* v. *Ross*, (1900) 1 Ch. 788.

(*c*) *Trent* v. *Hunt*, (1853) 9 Ex. 14.

(*d*) *Farr* v. *Newman*, (1792) 4 T. R. 621; *Fenwick* v. *Laycock*, (1841) 2 Q. B. 108. As to the position of executor who has been directed to employ part of the testator's estate in trade, see *Ex parte Garland*, (1803–4) 10 Ves. 110.

(*e*) (1798) 1 B. & P. 293.

(*f*) *Reddell* v. *Stowey*, (1841) 2 Moo. & R. 358.

(*g*) Com. Dig. Execution, C. 4. Under such circumstances it is usual for the officer first in possession to act as special bailiff in the execution of the second process. See *Ex parte Warren*, (1885) 15 Q. B. D. 48.

Limitations on sheriff's and high bailiff's right to possession money.

When several concurrent warrants of execution are issued against the goods of a judgment debtor and the high bailiff seizes sufficient chattels to satisfy the whole of the execution warrants without allocating particular goods to a particular warrant, the bailiff is only entitled to charge one possession fee on the whole. And the same rule applies where a sheriff has put a man in possession of goods under a writ of *fi. fa.* issued by one creditor, and afterwards receives and executes other writs against the same debtor from other creditors (*a*). But, on the other hand, if he seizes and appropriates different goods in satisfaction of each particular warrant, even though all the goods so allocated are on the premises at the same time, and possession under all the warrants is held synchronously by the same person, the bailiff is, nevertheless, entitled to possession money in respect of each particular warrant (*b*).

Effect of bankruptcy.

Insomuch as the title of the trustee in bankruptcy does not commence with his appointment, but relates back to any act of bankruptcy committed by the debtor within the three months prior to the presentation of the petition, it may frequently happen that goods are taken in execution which although apparently the property of the debtor, in reality, as it ultimately turns out, belong to the trustee. Under such circumstances the sheriff was formerly liable in trover to the assignee in bankruptcy (*c*). Various provisions were made under successive Bankruptcy Acts for obviating this hardship, and it is now provided that an execution creditor shall not be entitled to retain the benefit of an execution against a trustee in bankruptcy, unless he has completed it by seizure and sale (*d*) before the date of the receiving order and before notice of the presentation of a petition or of an available act of bankruptcy (*e*). It is apparently implied, but not expressed that where the creditor has received no such notice as is

Duty of officer executing writ.

(*a*) *Morgan, In re; Board of Trade, Ex parte*, (1904) 1 K. B. 68; *Glassbrook* v. *David and Vaux*, (1905) 1 K. B. 615.

(*b*) *Morgan, In re; Board of Trade, Ex parte*, (1904) 1 K. B. 68. As to excessive charges for distress and statutory limitations, see *Hoadland* v. *Coster*, (1904) 21 T. L. R. 123, C. A., as to method of recovery of excessive charges, see *Rex* v. *Bridport County Court Judge; Edwards, Ex parte*, (1905) 2 K. B. 108.

(*c*) *Garland* v. *Carlisle*, (1837) 4 Cl. & F. 693.

(*d*) See *Jones* v. *Parcell*, (1883 11 Q. B. D. 430.

(*e*) 46 & 47 Vict. c. 52, s. 45.

mentioned, he is entitled to retain the proceeds of the execution. The sheriff or other officer charged with the execution of the writ (*a*), if after seizure but before sale he is served with notice (*b*) of a receiving order, is bound upon request to deliver the goods to the official receiver or the trustee in bankruptcy. After sale, if the execution is for a judgment over twenty pounds, he is to retain the proceeds for fourteen days, and if within that time he receives notice of a bankruptcy petition "and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice," he is to pay the balance, after deducting expenses, to the trustee, otherwise he is to deal with it as if no notice had been served on him (*c*). In computing expenses in such case, the right of the sheriff to "possession money" is limited to twenty-one days, however long he may have been in possession prior to the bankruptcy (*d*). It is presumed that although the section does not, in terms, indemnify the sheriff from liability by reason of anything done under it, that no action will lie against him so long as he strictly performs his statutory duty (*e*).

Execution against the wrong party.

It sometimes happens that owing to a misnomer or confusion of names a question arises whether an execution, against either the person or goods is directed against the right individual. If there are two persons of the same name and judgment goes against one of them, it is the business of the sheriff or other officer to act at his peril. If he levies execution against the wrong man he is liable to an action of trespass; if he neglects to levy execution against the right man, he is liable to an action for neglect of duty at the suit of the execution creditor.

Must be against party intended to be sued.

The writ of execution follows the form of the judgment. It is immaterial by what name an execution debtor is described provided judgment has been obtained against him in that name (*f*).

(*a*) s. 168. A man who by direction of the sheriff takes possession of and sells the goods of the judgment debtor is not "an officer charged with the execution of a writ or other process": *Bellyse* v. *M'Ginn*, (1891) 2 Q. B. 227, following *Ex parte Warren*, (1885) 15 Q. B. D. 48.

(*b*) 53 & 54 Vict. c. 71, s. 11 (1).

(*c*) *Ibid.* (2).

(*d*) *English & Ayling, In re: Murray & Co., Ex parte*, (1903) 1 K. B. 680. As to general rule respecting right to "possession money," see *Morgan, In re; Board of Trade, Ex parte*, (1904) 1 K. B. 68.

(*e*) In the corresponding section of the Act of 1861 (24 & 25 Vict. c. 134 s. 73) there were words of indemnity.

(*f*) *Fisher* v. *Magnay*, (1843) 5 M. & G. 778.

When, therefore, execution has to be levied and any doubt arises as to the identity of the debtor, the question to be asked is, whether the man whose person or goods it is proposed to seize is the man against whom judgment has been obtained. If the party in question has appeared in the action, *cadit quæstio;* rightly or wrongly he has actually made himself the defendant (*a*). If he has never been served with proceedings the matter is equally clear the other way; he is an entire stranger to the action. The difficulty arises where he has been served, but has not appeared. In *Kelly* v. *Lawrence* (*b*), a certain person having a debt due from I. W. Kelly issued a writ against him, which was, by mistake, served upon M. Kelly, the plaintiff, who informed the person serving of the mistake but did not appear in the action and took no further notice of it. Judgment was obtained and a *capias* issued against I. W. Kelly, on which *capias* the plaintiff was arrested. In an action for false imprisonment against the sheriff it was contended that as the plaintiff had been served he was the defendant in the first action, and therefore the execution had rightly issued against him, but it was held that the whole proceedings were a nullity, inasmuch as there never had been any intention on the part of the plaintiff in the original action to sue him. Conversely it would seem that if a writ is served on the party intended, though he is wrongly described in the writ, and though he is not the real debtor, he cannot safely ignore the proceedings, for if he does not appear and judgment is obtained by default, that judgment, while it stands, will be good as against him and execution may issue under it. If A., having supplied goods to B., erroneously thinks that he has supplied them to C. and accordingly sues C. it is one thing; if knowing that he has supplied them to B. he mistakes C. for B. and serves him with process it is another.

Estoppel.

If an execution is levied on the goods of the wrong person he may sometimes be prevented from recovering in an action against the officer executing the writ by virtue of the doctrine of estoppel. He is estopped from asserting his own title if he has intentionally induced the officer to seize, by expressly or impliedly representing

(*a*) *Per Cur.*, *Walley* v. *M'Connell*, (1849) 13 Q. B. p. 912.

(*b*) (1864 3 H. & C. 1.

the goods in question to be the goods of the execution debtor. There must be something equivalent to a licence on his part. It has been held that a finding of a jury that the owner of the goods misled the sheriff so as to induce him to seize, does not establish an estoppel. In that case the owner had told a falsehood with the object of preventing a seizure, and not of inducing it (*a*). If a party, against whom there is a valid estoppel, at any time gives notice of the true state of facts to those executing the writ, he is not debarred from suing in respect of anything which they may subsequently do (*b*).

Cases where property of strangers may be taken in execution.

There are certain cases in which goods may be taken in execution which have ceased to be the property of the execution debtor: the execution creditor claiming by a higher and better title.

Fraudulent conveyances.

(a) By 13 Eliz. c. 5, any alienation of goods or chattels made for the purpose of hindering, delaying and defrauding creditors is void as against them, unless for valuable consideration, and to a party having no notice of the fraud. Goods, therefore, included in such a conveyance, though they cease to be the property of the assignor, are liable to the claims of his judgment creditors, and may be taken in execution (*c*). An execution on a fraudulent judgment is a fraudulent alienation within the meaning of the statute. Therefore, if a seizure of goods has been made under an execution more than sufficient in amount to exhaust their value, this is no reason against levying under a second writ, even though the officer have no notice of any fraud affecting the first execution, since he ought to give the second creditor the opportunity if he think fit of impeaching the validity of the first judgment (*d*).

Bills of sale.

(b) Certain bills of sale are void as against an execution creditor, though good against the grantor (*e*).

Goods aliened subsequently to issue of writ.

(c) A writ of *fi. fa.* directs the seizure of such goods as the debtor has at the time of its issue; therefore at common law

(*a*) *Freeman* v. *Cooke*, (1849) 4 Ex. 654. See, too, *Glaspoole* v. *Young*, (1829) 9 B. & C. 696; *Dawson* v. *Wood*, (1810) 3 Taunt. 256.

(*b*) *Dunstan* v. *Paterson*, (1857) 2 C. B. N. S. 495.

(*c*) *Twyne's Case*, (1601) 3 Rep. 80. And see *Slobodinsky, In re; Moore, Ex parte*, (1903) 2 K. B. 517.

(*d*) *Dennis* v. *Wetham*, (1874) L. R. 9 Q. B. 345.

(*e*) 41 & 42 Vict. c. 31, s. 8; 45 & 46 Vict. c. 43, s. 5.

goods aliened subsequently to that date may be followed and seized. By the Statute of Frauds (*a*) the writ does not "bind the property but from the time such writ shall be delivered to the sheriff, under-sheriffs or coroners to be executed." This provision only protects purchasers for value (*b*). By 19 & 20 Vict. c. 97, s. 1, purchasers for value, without notice of the delivery of the writ, are protected up to the actual seizure (*c*). In *Hobson* v. *Thelluson* (*d*) the debtor, knowing that a writ was in the sheriff's hands, made an assignment for the benefit of his creditors. It was held that the goods might nevertheless be seized, because the knowledge of the debtor was the knowledge of the trustees.

Estoppel of debtor does not bind execution creditor.

(d) The execution creditor is not bound by the estoppel of his debtor. In *Richards* v. *Johnson* (*e*) the plaintiff had taken an assignment of furniture from A. The goods really belonged to B., who had represented to the plaintiff that the goods were A.'s in such manner as to be estopped from setting up his own title. The defendant was a judgment creditor of B., and seized the furniture under a writ of *fi. fa.* It was held that he could set up B.'s title, though B. himself could not have done so.

Rival writs.

Where there are more writs than one to be executed they take precedence in the order of their delivery. But if the execution creditor countermands his writ it loses its priority, and must be postponed to all writs delivered previously to the countermand (*f*).

How much should be seized under *fi. fa.*

Under a *fi. fa.* only sufficient goods should be seized in the first place to satisfy the judgment debt and the charges (*g*); if more is taken an action lies at the suit of the execution debtor for any damage occasioned by the breach of duty (*h*). And the same rule applies in the case of a distress for rates (*i*).

(*a*) 29 Car. II. c. 3, s. 15.

(*b*) *Per* Ashurst, J., *Hutchinson* v. *Johnston*, (1787) 1 T. R. p. 731; *per* Mellish, L.J., *Ex parte Williams*, (1872) L. R. 7 Ch. p. 317.

(*c*) It would seem that these statutes apply to county court executions; see Pitt-Lewis' County Court Practice, 3rd ed., p. 688.

(*d*) (1867) L. R. 2 Q. B. 642.

(*e*) (1859) 4 H. & N. 660; followed in *Richards* v. *Jenkins*, (1886–7) 17 Q. B. D. 544; 18 Q. B. D. 451.

(*f*) *Hunt* v. *Hooper*, (1844) 12 M. & W. 664.

(*g*) As to seizing to satisfy landlord's claim for rent, see below, p. 766.

(*h*) *Gawler* v. *Chaplin*, (1848) 2 Ex. 503.

(*i*) *Baker* v. *Wicks*, (1904) 1 K. B. 743. As to method of recovering excessive charges for distress, see *Rex* v. *Bridport County Court Judge*; *Edwards Ex parte*, (1905) 2 K. B. 108.

When goods are seized (*a*) the seizure *primâ facie* operates as a discharge to the judgment debtor to the extent of their value. The sheriff or other officer acquires a special property in the goods which enables him to maintain an action against any third party who is guilty of a tortious act in respect of them (*b*). And to this remedy he must look in case of a rescue, for, since the seizure *primâ facie* discharges the execution debtor to the extent of the value of the goods seized, the officer becomes liable to the same extent to the execution creditor. His duty is absolute, subject only to the usual exception of the act of God and the King's enemies (*c*).

Responsibility of officer for goods seized.

The actual custody of the goods seized should be retained. An abandonment of possession is an abandonment of the execution. It would seem to be otherwise, however, if there is a mere quitting of possession for some temporary purpose (*d*).

Abandonment by loss of possession.

It is a right incidental to the due execution of the writ that the officers may remain on the premises for such a time as is reasonably sufficient to enable them to sell the goods. If this time is exceeded their further continuance is a trespass (*e*); in addition to this, an unreasonable delay in selling is a breach of duty (*f*).

Right to remain on premises.

In the case of county court executions the manner of sale is regulated by 51 & 52 Vict. c. 43, s. 154, and in all other executions above twenty pounds (including expenses), the sale, unless otherwise ordered, is to be by public auction after due advertisement for three days previously (*g*). Apart from these statutes, there is only the general duty to act in a reasonable and honest manner (*h*).

Manner of sale.

If a sheriff can obtain no reasonable bid for goods, it is a proper course for him to keep them unsold, and to return that

Failure of sale.

(*a*) As to what amounts to seizure, see *Gladstone* v. *Padwick*, (1871) L. R. 6 Ex. 203.

(*b*) *Wilbraham* v. *Snow*, (1669) 2 Wm. Saund. 47 a.

(*c*) *Clerk* v. *Withers*, (1704) Lord Raym. 1072; *Mildmay* v. *Smith*, (1671) 2 Wm. Saund. 343; *Southcote's Case*, (1600) 4 Rep. 84. The duty was the same in case of an arrest, but now see 40 & 41 Vict. c. 21, s. 31; 50 & 51 Vict. c. 55, s. 16.

(*d*) *Blades* v. *Arundale*, (1813) 1 M. & S. 711; *Ackland* v. *Paynter*, (1820) 8 Price, 95.

(*e*) *Ash* v. *Dawnay*, (1852) 8 Ex. 237. They are probably not trespassers *ab initio*. See *Smith* v. *Eggington*, (1837) 7 A. & E. 167.

(*f*) *Jacobs* v. *Humphrey*, (1834) 2 C. & M. 413; *Ayshford* v. *Murray*, (1870) 23 L. T. N. S. 470.

(*g*) 46 & 47 Vict. c. 52, s. 145.

(*h*) *Hernaman* v. *Bowker*, (1856) 11 Ex. 760. See also *Ex parte Villars*, (1874) L. R. 9 Ch. 432.

they remain on his hands *pro defectu emptorum*. The judgment creditor may then obtain a writ of *venditioni exponas*, the meaning of which is to command the sheriff to sell for the best price he can (*a*). If on the second attempt no bids can be obtained, the creditor, if he wishes to obtain the fruits of the execution, must himself be the purchaser (*b*). In cases of distress for rent, except when the sale proves abortive, the landlord is not, however, entitled to buy in the goods (*c*).

Conduct of sale.

It is a duty to sell for the best price that can be obtained; in other words, there must be a reasonable and careful conduct of the sale (*d*). A breach of this duty is a wrong to the creditor if thereby his execution is not completely satisfied, and to the debtor in any case, and the officer is liable to one or the other for the difference between the price actually obtained and that which ought to have been obtained.

Excessive sale.

It is further a duty to the debtor to sell only a sufficient amount of goods (*e*), and if, after the debt and charges have been realised, other goods are sold, it is an act of trespass and conversion, for the authority is determined. If before sale the claim of the creditor is in any way satisfied, the officer has no right on his own account to sell for the purpose of satisfying his charges, though possibly he may do so on the instructions of the creditor (*f*).

Duty towards party arrested.

The duties of sheriffs' officers towards persons whom they arrest on civil process are defined by 50 & 51 Vict. c. 55, s. 14 (*g*). By s. 15 of the same Act a person unlawfully imprisoned by the sheriff has an action against him in like manner as against any other person who should imprison him without warrant (*h*).

Making return to writ.

If either the creditor or debtor is dissatisfied with the pro-

(*a*) *Keightley* v. *Birch*, (1814) 3 Camp. 521.

(*b*) *Leader* v. *Danvers*, (1798) 1 B. & P. 359.

(*c*) *Moore, Nettlefold & Co.* v. *Singer Co.*, (1903) 2 K. B. 168; affirmed (1904) 1 K. B. 820, C. A.

(*d*) *Gawler* v. *Chaplin*, (1848) 2 Ex. 503. See *Wright* v. *Child*, (1866) L. R. 1 Ex. 358; *Mullett* v. *Challis*, (1851) 16 Q. B. 239.

(*e*) *Gawler* v. *Chaplin*, *supra*.

(*f*) *Sneary* v. *Abdy*, (1876) 1 Ex. D. 299.

(*g*) An arrest upon a commitment order under s. 5 of the Debtors Act, 1869, is not within the section: *Mitchell* v. *Simpson*, (1890) 25 Q. B. D. 183.

(*h*) As to liability of sheriffs and their officers to penalties for breaches of the provisions of this Act, see *Bagge* v. *Whitehead*, (1892) 2 Q. B. 355; *Shepper* v. *Nathan*, (1892) 1 Q. B. 245; *Lee* v. *Dangar Grant & Co.*, (1892) 2 Q. B. 337.

ceedings of a sheriff in an execution, he may apply to the Court to direct a return to the writ (*a*). If, in making his return, the sheriff discloses a breach of duty on his part, as, for instance, if he returns that he seized certain goods and they were rescued out of his hands, the admitted liability can be enforced by *scire facias* (*b*). If by his return he discharges himself, the party who considers himself aggrieved may bring an action for a false return and alternatively may sue in respect of the misconduct on which he actually relies. Thus, if the sheriff has neglected to seize goods under a *fi. fa.* when he might have done so, the execution creditor has at once a cause of action, but he may if he please proceed to obtain a return from the sheriff. If the sheriff returns *nulla bona*, he then can sue both for the false return and also the failure to seize, but his grievance and measure of damages under both heads are the same, that is to say, the loss suffered by the neglect to levy. A mere false return, when there has been no breach of duty in other respects, is not actionable (*c*).

Damages for pure trespass.

When in the course of an execution a wrongful act has been committed which is not merely irregular, but altogether unauthorised, so as to be a trespass or act of conversion, the measure of damages will be the same as if the wrong-doer possessed no official character. If goods are seized outside the jurisdiction the plaintiff will be entitled to recover their whole value and not merely the damage which the jury may think he has suffered by their being taken in the wrong place.

For breach of duty.

But when the cause of action is a mere breach of duty the measure of damage is the actual loss having regard to all the circumstances of the case (*d*). Thus if a sheriff neglects to seize but the jury are satisfied that in all probability bankruptcy would have supervened on the execution, had it taken effect, so that the proceeds would have gone to the trustee in bankruptcy and not to the execution creditor, the latter cannot maintain an action (*e*).

(*a*) The creditor can do so at any time, the debtor only after execution : *Richardson* v. *Trundle*, (1860) 8 C. B. N. S. 474.

(*b*) *Sly* v. *Finch*, (1618) Cro. Jac. 514.

(*c*) *Stimson* v. *Farnham*, (1871) L. R. 7 Q. B. 175.

(*d*) As to breach of duty by county court officers, see 51 & 52 Vict. c. 43, ss. 49, 50.

(*e*) *Hobson* v. *Thelluson*, (1867) L. R. 2 Q. B. 642.

It has been held, however, that it is for the defendant to negative the damage, and in the absence of evidence one way or the other the plaintiff will be entitled to a nominal verdict (*a*). This rule does not apply to the action for permitting the escape of a person arrested for debt, which, however, is now practically obsolete. In that action the plaintiff was always entitled to succeed although actual loss was negatived; but in such case he could recover nominal damages only (*b*).

In *Mason* v. *Paynter* (*c*) the plaintiff had obtained judgment, which was afterwards set aside on terms. Before the setting aside he placed his writ in the hands of the sheriff. The sheriff objected, and the plaintiff was put to costs in endeavouring to make him proceed. It was held that he might recover them as damages in an action for the breach of duty. It would have been otherwise, of course, had the judgment been set aside for irregularity, for a party is not entitled to have such a judgment executed, and, indeed, may be liable to an action if he proceeds upon it.

Landlord's rights in execution.

By 8 Anne, c. 14, s. 1, no goods or chattels on any land leased for lives, years, or otherwise shall be liable to be taken in execution, unless the execution creditor shall before the removal of the goods pay the landlord all the rent in arrear not exceeding one year's rent (*d*). By 7 & 8 Vict. c. 96, s. 67, if premises are let by the week, or any other term less than a year, the landlord can in no case claim for the arrears of more than four such terms against the execution.

Sheriff's liability.

It will be observed that the first of these enactments construed literally makes the execution actually unlawful if the landlord is not satisfied. It has been decided, however, that a breach of the statute does not make the sheriff a trespasser or affect his title to the goods taken (*e*). The common practice is for the sheriff to sell, and after paying the landlord's claim to apply the rest of the proceeds to the debt, but he is not bound to follow this course, and he may refuse to go on with the execution until

(*a*) *Per Cur.*, *Wylie* v. *Birch*, (1843) 4 Q. B. p. 578.

(*b*) *Williams* v. *Mostyn*, (1838) 4 M. & W. 145; *Clifton* v. *Hooper*, (1844) 6 Q. B. 468.

(*c*) (1841) 1 Q. B. 974.

(*d*) *Wren* v. *Stokes*, (1902) 1 Ir. R. 167, C. A. As to county court executions, see below, p. 769.

(*e*) *Wharton* v. *Naylor*, (1848) 12 Q. B. 673; but see *Wren* v. *Stokes*, *supra*.

the landlord has been paid out by the execution creditor (*a*). If, however, he does not see this done, then he is the person who must answer to the landlord for the rent (*b*). In terms the duty imposed by the statute is absolute, but here again the literal construction is not followed, for without notice or knowledge of the landlord's claim there is no breach of duty (*c*). In the absence of such notice or knowledge only such goods should be seized as are sufficient to meet the debt, costs and charges. If the landlord afterwards makes a claim, he must be paid out and an additional seizure made (*d*).

It has been held that if between the removal of the goods and the payment over of the proceeds to the execution creditor notice is given to the sheriff of rent in arrear, an order may be made by the Court that the landlord be satisfied out of the money in hand (*e*). This might in some cases operate as a hardship on the execution creditor, as the fund thus diminished would not pay him in full, while it might be too late to make a fresh seizure.

If the sheriff removes goods under the colour of an execution he is liable, although the removal be unlawful, as when the goods of the wrong party are taken. The injury to the landlord is not lessened by the fact of the trespass (*f*).

What rent may be claimed.

The landlord cannot claim for rent accruing during the continuance of possession under the execution. It must be due at the time of taking the goods, but if so due it makes no difference that by the terms of the contract of tenancy it is payable in advance (*g*). Nor does s. 2 of the Apportionment Act, 1870, apply to rent or other payments in the nature of income actually accrued before the happening of the event on account of which it is proposed to apply the Act (*h*). However, by 14 & 15 Vict. c. 25, s. 2, when growing crops are taken in execution they

(*a*) *Cocker* v. *Musgrove*, (1846) 9 Q. B. 223.

(*b*) *Riseley* v. *Ryle*, (1843) 11 M. & W. 16. Whether there is any liability on the execution creditor seems doubtful: *ibid.*

(*c*) *Arnitt* v. *Garnett*, (1820) 3 B. & Ald. 440; *Andrews* v. *Dixon*, (1820) *ibid.* 645.

(*d*) *Per Cur.*, *Gawler* v. *Chaplin*, (1848) 2 Ex. p. 507.

(*e*) *Arnitt* v. *Garnett*, *supra.*

(*f*) *Foster* v. *Cookson*, (1841) 1 Q. B. 419.

(*g*) *Harrison* v. *Barry*, (1819) 7 Price, 690.

(*h*) *Ellis* v. *Rowbotham*, (1900) 1 Q. B. 740, C. A.

remain subject to distress so long as they remain on the farm for any rent which accrues after the seizure.

The statute of Anne only applies to a case of an adverse execution. If the landlord is the creditor he must, in case of bankruptcy, hand over the goods or proceeds without deduction (*a*).

No claim where no right of distress.

As a general rule the landlord's right under the statute is coincident with his right of distress. Thus he may recover in respect of arrears in case of an execution put in on an under-tenant (*b*). On the other hand, where a tenant had occupied under an agreement for a lease of years, which was void as not being in writing, and there was no evidence of any payment of rent, it was held that under such circumstances he would not be liable to distress, but only to an action for use and occupation and therefore that the landlord could not claim to have his rent paid by the sheriff (*c*). It does not follow, however, that the mere right of distress is enough; there must be a subsisting tenancy as well. In *Cox* v. *Leigh* (*d*) the execution debtor had continued in occupation after the expiration of his tenancy, and within the six months during which the landlord's right of distress continued (*e*) an execution was levied and the goods removed without payment of arrears of rent. It was held that no action lay against the sheriff, insomuch as at the time of the execution the tenancy had determined.

There must be an actual tenancy.

When sub-lease amounts to an assignment.

Moreover as a sub-lease, for a period co-extensive with the sub-lessor's term, operates as an assignment the sub-lessor cannot distrain for rent in arrear (*f*).

Measure of damages.

The measure of damages in this form of action is *primâ facie* the whole amount of the rent which the sheriff ought to have paid; but this may be reduced by proving that the value of the goods removed was in fact less (*g*). It makes no difference that goods were left on the premises after the satisfaction of the execution, available for distress (*h*). It was said in *Riseley* v.

(*a*) *Taylor* v. *Lanyon*, (1830) 6 Bing. 536.

(*b*) *Thurgood* v. *Richardson*, (1831) 7 Bing. 428.

(*c*) *Riseley* v. *Ryle*, (1843) 11 M. & W. 16. Now, however, see *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9.

(*d*) (1874) L. R. 9 Q. B. 333.

(*e*) 8 Anne, c. 14, ss. 6, 7.

(*f*) *Lewis* v. *Baker*, (1905) 1 Ch. 46.

(*g*) *Thomas* v. *Mirehouse*, (1887) 19 Q. B. D. 563.

(*h*) *Colyer* v. *Speer*, (1820) 2 B. & B. 67.

Ryle (*a*) that the landlord might sue in respect of what was not distrainable as well as what was, the statute having made no difference in that respect.

Claim of rent in county court executions.

The statute of Anne does not apply to county court executions, which are regulated by 51 & 52 Vict. c. 43, s. 160, directing the bailiff where the landlord makes a claim to distrain in addition to the execution. Under such statutory distress the goods of a stranger cannot be taken (*b*).

Preferential claim for taxes.

By 43 & 44 Vict. c. 19, s. 88, when goods are taken under any process, except at the suit of the landlord for rent, they may not be removed unless the arrears and amount payable for the current year of land-tax, inhabited house duty, and income-tax, not exceeding in the whole one year's payment, are first discharged. The duty of the officer under the enactment appears analogous to that under 8 Anne, c. 14, s. 1.

Constables.

The most important class of ministerial officers of justice are constables; of these there are five kinds, metropolitan, special, county, municipal, and parochial. The metropolitan police were first instituted by 10 Geo. IV. c. 44. Their authority is regulated by that Act and a variety of amending Acts, of which 2 & 3 Vict. c. 47, is the principal (*c*). They have all the rights and duties which any constable has or may have at common law or under any existing or future statute (*d*), and by the various Metropolitan Police Acts they have a variety of special powers given them. Their constablewick is defined by the Act under the name of the Metropolitan Police district, but they also may act in all parts of Middlesex, Surrey, Hertfordshire, Essex, Kent, Berkshire, Buckinghamshire, the City of London, and on the lower course of the Thames (*e*). They also serve in dockyards and military stations (*f*).

Metropolitan police.

Special constables.

Special constables are appointed by virtue of 1 & 2 Will. IV. c. 41. They have all the rights and duties throughout the

(*a*) *Per* Parke, (1843) 11 M. & W. p. 22.

(*b*) *Beard* v. *Knight*, (1858) 8 E. & B. 865.

(*c*) Recent statutes relating to metropolitan police are the Metropolitan Police Courts Act, 1898 (61 & 62 Vict. c. 31); the Metropolitan Police Act, 1899 (62 & 63 Vict. c. 26).

(*d*) 10 Geo. IV. c. 44, s. 4; 2 & 3 Vict. c. 47, s. 5.

(*e*) *Ibid.*

(*f*) 23 & 24 Vict. c. 135. The City of London police are regulated by 2 & 3 Vict. c. 94, a local Act, but declared public.

jurisdiction of the justices appointing them possessed at the time of the passing of the Act by duly appointed constables (*a*). They may also act in certain cases in adjoining jurisdictions (*b*).

County police.

County police were first established by 2 & 3 Vict. c. 93. They have the powers, privileges, and duties of duly appointed constables, either at common law or under any statute made or to be made. They may act not only within their own county, but in detached parts of other counties locally situated in their own county, and in any adjoining county (*c*). They have also certain powers in boroughs, any part of which is contained in their county (*d*).

Borough police.

Borough police are appointed under 45 & 46 Vict. c. 50, s. 191 (the Municipal Corporations Act, 1882), and have all such powers and privileges and liabilities as any constable has for the time being in his constablewick either at common law or by statute. They may act not only in their own borough but in any county in which any part of the borough is situate, and in any part of any county within seven miles of the borough. In many places, however, the police are regulated by a special Act. In these special Acts the Town Police Clauses Act is generally incorporated (*e*). Where this Act applies, the constable has within the limits of the special Act and for five miles beyond the same powers, privileges, duties, indemnities, and protection, as any constable has within his constablewick by law (*f*).

Parish constables.

Parish constables are appointed by the county authority under 35 & 36 Vict. c. 92. Their position is defined by s. 7 of that Act and 5 & 6 Vict. c. 109, s. 15.

Watchmen, &c.

Watchmen may be appointed under the Lighting and Watching Act (*g*), constables under the Canal Act (*h*), and water bailiffs under the Fishery Acts (*i*), all of whom have for the purpose of their special duties all the powers of ordinary constables.

Authority of constable.

A constable acts either in virtue of his office or under the special authority given by a warrant addressed to him.

(*a*) s. 5.
(*b*) s. 6.
(*c*) 2 & 3 Vict. c. 93, s. 8.
(*d*) 19 & 20 Vict. c. 69, s. 6.
(*e*) 10 & 11 Vict. c. 89.
(*f*) s. 8.
(*g*) 3 & 4 Will. IV. c. 90, s. 42.
(*h*) 3 & 4 Vict. c. 50.
(*i*) 28 & 29 Vict. c. 121, s. 27; 36 & 37 Vict. c. 71, s. 36; 41 & 42 Vict. c. 39, s. 8.

In virtue of office.

It is clear that when acting in virtue of his office a constable has at common law no less authority than is possessed by a private individual (*a*). The statutes which give powers of arrest to members of the public or owners of property endangered, nearly all give the same powers to constables. There are, however, some exceptions. Thus, in certain offences under the game laws (*b*), owners and occupiers of land, gamekeepers, &c., may arrest, but constables have no power to do so in virtue of their office.

In case of breaches of the peace.

A constable may act in respect of a breach of the peace on the information and complaint of others. If he comes up to a spot where an affray is said to be in progress and is led reasonably to believe that a breach of the peace has already occurred, and is likely to be immediately renewed, he may apprehend the inculpated parties for the preservation of the peace. So he may receive into his custody a person already apprehended by a bystander provided he reasonably believes that the prisoner was apprehended while in the act of breaking the peace (*c*). The mere fact that this information was incorrect will not deprive him of justification. It is also sometimes laid down that a constable may arrest for a breach of the peace committed in his own view, even though the danger of its renewal be over, provided he does so on a fresh pursuit. This proposition, however, is a doubtful one, and the authorities are conflicting. In no case has it ever been decided that an arrest without warrant is lawful after the affray is entirely over, but an arrest justifiable on the ground of a continuance of the affray has sometimes been justified also on the ground that it was made on a fresh pursuit (*d*). "I consider," says Williams, J., "that a policeman who is witness of an assault has an authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression 'recently' not only to prevent a further breach of the peace, but where his object is to secure the man for the purpose of taking him before a magistrate" (*e*). The authority of Hale

(*a*) Hawkins, P. C., Vol. 2, p. 128.

(*b*) 9 Geo. IV. c. 69, s. 2; 1 & 2 Will. IV. c. 32, s. 31.

(*c*) *Per Cur.*, *Timothy* v. *Simpson*, (1835) 1 C. M. & R. pp. 761, 763. See *Hobbs* v. *Branscomb*, (1813) 3 Camp. 420.

(*d*) *Reg.* v. *Light*, (1857) 27 L. J. M. C. 1; see *Reg.* v. *Walker*, (1854) 1 Dears. & Pearce, C. C. 358; *Reg.* v. *Marsden*, (1868) L. R. 1 C. C. R. 131.

(*e*) *Reg.* v. *Light*, *supra*, p. 3.

supports this view (*a*). Hawkins and East, on the contrary, appear to think that, the affray once over, a constable and a private individual stand on the same footing with respect to power of apprehension (*b*). The latter view on principle seems preferable, for "it is the business of a constable to preserve the peace, not punish a breach of it" (*c*).

It is said that if an affray is going on in a house within the hearing of a constable he may break open an outer door to put a stop to it, and that if an affray has taken place in his view he may on a fresh pursuit do likewise in order to arrest the affrayers (*d*). A private person may break and enter a dwelling-house to prevent the commission of a capital felony (*e*).

Suspicion of felony.

At common law a constable has authority, without warrant, to arrest anybody whom he reasonably suspects of felony or treason, even though no crime have in fact been committed (*f*), and it seems that a constable is justified in arresting, without a warrant, a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed here (*g*). Knowledge by a police constable that a warrant has been issued by a duly authorised magistrate for the arrest of a particular person for felony constitutes a sufficient ground of reasonable suspicion that a felony has been committed by such person to authorise the constable to arrest him (*h*). A direct charge made by a third party may of itself be sufficient to justify arrest by a constable, unless there are surrounding facts

(*a*) Hale, P. C., Vol. 2, p. 90.

(*b*) East, P. C., Vol. 1, pp. 305-6; Hawkins, P. C., Vol. 1, p. 491; Vol. 2, p. 129; see, however, Vol. 2, p. 136.

(*c*) Hawkins, P. C., Vol. 1, p. 491. See too *per* Alderson, J., *Cook* v. *Nethercote*, (1835) 6 C. & P. 744.

(*d*) Hawkins, P. C., Vol. 2, p. 136; see Hale, P. C., Vol. 2, p. 95; *Reg.* v. *Marsden*, (1868) L. R. 1 C. C. R. 131, *supra*; Dalton's Justice of the Peace, 2nd ed. p. 300. This is not included in the list of cases in which outer doors may be broken, given in Foster's C. C., p. 320.

(*e*) *Handcock* v. *Baker*, (1800) 2 Bos. & P. 260.

(*f*) *Davis* v. *Russell*, (1829) 5 Bing. 354; *Beckwith* v. *Philby*, (1827) 6 B. & C. 635; *per* Blackburn, J., *Hadley* v. *Perks*, (1866) L. R. 1 Q. B. p. 456. The Riot Act, 1 Geo. I. stat. 2, c. 5, gives constables and others special powers of arresting members of a mob refusing to disperse after the expiry of an hour from the time of proclamation made. As, however, the offence is felony, the power seems superfluous.

(*g*) *Per* Brett, L.J., *Reg.* v. *Weil*, (1882) 9 Q. B. D. p. 706. In cases of arrest without warrant, the provisions of s. 38 of the Summary Jurisdiction Act, 1879, should be complied with.

(*h*) *Creagh* v. *Gamble*, (1888) 24 L. R. Ir. 458

to show that the charge is unreasonable (*a*). It has been already seen that any one may break open an outer door to arrest an actual felon (*b*). Hale lays it down that this may be done by a constable on suspicion merely if the crime have in fact been committed. But this view does not seem supported by other authority (*c*).

Misdemeanour.

With regard to charges of misdemeanour other than breaches of the peace, and offences punishable in a summary manner, constables by the common law stand on the same footing as private individuals and have no power of arrest without warrant (*d*). Special powers are however conferred upon them by a great variety of statutes in addition to those enumerated in Chapter IX. (*e*).

Statutory powers.

By 19 Geo. II. c. 21, s. 3, they may arrest and take before a magistrate unknown persons committing the offence of profane swearing in their presence. The audible use by known parties of profane language in a public place, and probably also in a dwelling-house the outer door of which is open, is penalised by the same Act. By 60 Geo. III. & 1 Geo. IV. c. 1, s. 2, they may disperse meetings unlawfully assembled for military training and arrest all who are aiding and abetting at such meetings. 3 & 4 Vict. c. 50, ss. 9, 10, gives them power of search and arrest in respect of offences on canals and navigable rivers.

They may apprehend, while on duty in the night-time, persons reasonably suspected of unlawful possession of certain kinds of goods, tools, and materials under 6 & 7 Vict. c. 40, s. 9.

Under 23 & 24 Vict. c. 32, ss. 2, 3, they may arrest for brawling in church and otherwise disturbing divine service. Under 24 & 25 Vict. c. 96, s. 104, they may arrest persons found loitering at night and reasonably suspected of any felony against the Act. Similar provisions are contained in 24 & 25 Vict. c. 97, s. 57, and 24 & 25 Vict. c. 100, s. 66.

Under 25 & 26 Vict. c. 114, s. 2, they may stop in the highway and search persons reasonably suspected of having been trespassing in pursuit of game.

(*a*) *Hogg* v. *Ward*, (1858) 3 H. & N. 417.

(*b*) See above, p. 204.

(*c*) Hale, P. C., Vol. 2, p. 92.

(*d*) *Griffin* v. *Coleman*, (1859) 4 H. & N. 265.

(*e*) See above, pp. 204 *sqq*.

Under 34 & 35 Vict. c. 112, s. 3, they may arrest persons holding tickets of leave or being under police supervision whom they reasonably suspect of having committed any offence.

33 & 34 Vict. c. 72, ss. 17, 18, gives power to apprehend pedlars refusing to produce their licences or permit their packs to be examined.

Under 34 & 35 Vict. c. 112, s. 7, extended by 54 & 55 Vict. c. 69, s. 6, persons twice previously convicted may be apprehended for certain special offences. By s. 16 of the same Act certain powers of search are given to chief officers of police.

38 & 39 Vict. c. 25, s. 6, gives power of search and detention on reasonable suspicion of unlawful possession of public stores.

Under the Explosives Act constables have certain powers of search and seizure (*a*), in addition to the powers of arrest which they possess in common with the occupiers of endangered property (*b*).

Under the Diseases of Animals Act, 1894 (*c*), constables may detain persons found committing or reasonably suspected of being engaged in committing offences against the Act, and if they do not know and cannot satisfy themselves of the names and addresses of the persons so arrested, may take them before a magistrate.

By various clauses of the Licensing Acts constables have power of entry on licensed houses (*d*), and may arrest persons found there during closing time who give names and addresses reasonably supposed to be false (*e*). They have similar powers with respect to persons whom they find on premises where liquor is illegally sold (*f*). By the Licensing Act, 1902, they may arrest any person found drunk and incapable in any highway or public place (*g*).

Water bailiffs appointed under the Fishery Acts (*h*) are, as has been already seen, in the position of constables. Their powers of arrest and search are defined by 36 & 37 Vict. c. 71, ss. 36–8.

The Prevention of Cruelty to Animals Act, 1849 (*i*), empowers

(*a*) 38 & 39 Vict. c. 17, ss. 73–5.
(*b*) s. 78. See above, p. 206.
(*c*) 57 & 58 Vict. 57, ss. 43, 44.
(*d*) 37 & 38 Vict. c. 49, s. 16.
(*e*) 35 & 36 Vict. c. 94, s. 25.
(*f*) 37 & 38 Vict. c. 49, s. 17.
(*g*) 2 Edw. VII. c. 28, s. 1.
(*h*) 28 & 29 Vict. c. 121, s. 27; 41 & 42 Vict. c. 39, s. 8.
(*i*) 12 & 13 Vict. c. 92, s. 13.

a constable upon his own view or upon the complaint or information of another person to apprehend offenders and forthwith without any other authority or warrant convey them before a justice.

Under the Prevention of Cruelty to Children Act, 1904 (*a*), a constable may, under the circumstances therein specified, take into custody without warrant offenders whose names and addresses are unknown and cannot be ascertained.

Under the Indecent Advertisements Act, 1889 (*b*), a constable may arrest without warrant on view of an offence against the Act.

Special powers of metropolitan police.

By a variety of clauses in 2 & 3 Vict. c. 47, very extensive powers are given to the police in the metropolitan area of entering vessels, and certain unlawful houses and places of entertainment, of detaining property and arresting offenders and suspected persons, without warrant (*c*). They have also powers of arresting street musicians and persons disobeying traffic regulations (*d*). The City of London Police Act contains provisions substantially resembling those of 2 & 3 Vict. c. 47 (*e*). Special powers of arrest without warrant are given to constables acting under the authority of any Act incorporating the Towns Police Clauses Act (*f*), and to constables acting under the authority of the Municipal Corporations Act of 1882 (*g*).

Receiving in charge.

As a rule the duty of a private individual who arrests under the statutory powers enumerated in Chapter IX. is to hand over his prisoner to a constable (*h*). As the latter cannot know of himself whether the original arrest was lawful or not, it would seem that he is entitled to act on the information of the arresting party, and to continue the imprisonment if he reasonably believes its inception lawful, whatever the real facts of the case may be.

In *Bowditch* v. *Fosberry* (*i*), the defendant was a constable in charge of a station-house in the City of London. The plaintiff was illegally arrested by another constable on a charge of perjury,

(*a*) 4 Edw. VII. c. 15, s. 4.

(*b*) 52 & 53 Vict. c. 18, s. 6.

(*c*) ss. 33, 34, 35, 46, 47, 48, 54, 63, 64, 65, 66, 67, 68.

(*d*) 27 & 28 Vict. c. 55, s. 1; 30 & 31 Vict. c. 134, s. 12. The latter Act includes the City of London. See also the Metropolitan Streets Act, 1903 (3 Edw. VII. c. 17), and regulations made thereunder.

(*e*) 2 & 3 Vict. c. xciv.

(*f*) 10 & 11 Vict. c. 89, s. 15.

(*g*) 45 & 46 Vict. c. 50, s. 193.

(*h*) See above, pp. 204 *sqq*.

(*i*) (1850) 19 L. J. Ex. 339.

and brought to the station and there locked up by the defendant. It was held that the latter was protected by 2 & 3 Vict. c. 94, s. 50, which enacts that every person taken into custody by a constable without warrant "shall be forthwith delivered into the custody of the constable in charge of the nearest station-house in order that such person may be secured until he can be brought before any justice" (*a*).

Liability where original arrest wrongful.

Subject, however, to the exceptions above pointed out, a constable who receives a prisoner from the hands of another person and continues or assists to continue an imprisonment is guilty of a trespass if it appear that the original arrest was unlawful (*b*). Thus if a statute gives authority to private individuals to arrest offenders and take them before a magistrate, without saying anything about handing them over to a constable, it will be at the risk of the constable if he interferes to take charge of prisoner.

Warrants.

Warrants are directed to a constable either by name or description of his office. The common law rule is, that where a warrant is directed to any one by name, he may execute it anywhere within the jurisdiction of the authority by which it is issued, but where it is directed to a constable by the description of his office, he can only execute it within the limits of his constablewick (*c*). A warrant directed to constables generally can at common law only be executed by any particular officer within the limits of his constablewick (*d*).

Warrants of justices.

The execution of magistrates' (*e*) warrants is now regulated by statute. 11 & 12 Vict. c. 42, ss. 10, 11, deals with warrants for the apprehension of any person charged with an indictable offence. Magistrates may direct warrants to any constable by name or by description of his office, or to any particular constable and all

(*a*) In this case, which was decided on demurrer, it appeared from the pleadings that the defendant knew the charge against the plaintiff, and therefore knew the imprisonment to be illegal. This point, however, does not seem to have been adverted to. It has already been pointed out (see above, p. 745), that any one who receives another into custody under a lawful warrant is protected though he may be aware that it was illegally executed.

(*b*) *Griffin* v. *Coleman*, (1859) 4 H. & N. 265.

(*c*) *Per* Best, J., *Rex* v. *Weir*, (1823) 1 B. & C. pp. 296–7; Hawkins, P. C., Vol. 2, p. 135.

(*d*) *Gladwell* v. *Blake*, (1834) 1 C. M. & R. 636.

(*e*) A warrant holds good though the justice by whom it is issued die or cease to hold office: 42 & 43 Vict. c. 49, s. 37.

other constables within their jurisdiction, or generally to all constables within their jurisdiction. A warrant addressed to all constables within the jurisdiction may be executed by any such constable within those limits, whether outside his own constablewick or not, and on a fresh pursuit seven miles beyond. If the party charged is, or escapes, outside the currency of the warrant it must be backed by a magistrate of the district where it is sought to apprehend him, and when so backed it may be executed by the person bringing the warrant, by any person to whom it was originally directed, and by all peace-officers of the jurisdiction within which the indorsement is made.

Warrants for the apprehension of persons charged with offences punishable on summary conviction, or of persons not appearing in answer to a summons, are in the same form, and confer the same powers on the officers to whom they are addressed with respect to locality, as do warrants for the apprehension of persons charged with indictable offences (*a*).

Warrants may be issued for the apprehension of defaulting witnesses (*b*), for levying distresses (*c*), and for commitment (*d*), but in all these cases the common law rule appears to apply, and the constable unless addressed by name cannot act outside the limits of his constablewick. Where a warrant of distress is backed by a justice of another jurisdiction, it confers authority not only on the officers to whom it was originally directed, but also on the officers of the district where the indorsement is made (*e*), but in other cases under 11 & 12 Vict. c. 43, indorsed warrants must be executed by the person bringing the warrant or by some person to whom it was originally directed (*f*).

Search warrants.

Search warrants are issued by justices at common law for the purpose of discovery of stolen property (*g*), by statute for the purpose of seizing the implements of coining and forgery, instruments and things kept for the purpose of committing felonies against the person (*h*), and in a great variety of other

(*a*) 11 & 12 Vict. c. 43, s. 3.
(*b*) 11 & 12 Vict. c. 42, s. 16; 11 & 12 Vict. c. 43, s. 7.
(*c*) 11 & 12 Vict. c. 43, ss. 19, 27.
(*d*) *Ibid.* ss. 22–4, 27.
(*e*) *Ibid.* s. 19.
(*f*) ss. 3, 7.
(*g*) See also 6 & 7 Vict. c. 40, s. 8; 24 & 25 Vict. c. 96, s. 103.
(*h*) 24 & 25 Vict. c. 98, s. 46; 24 & 25 Vict. c. 99, s. 27; 24 & 25 Vict. c. 100, s. 65.

cases for the purpose of preventing and detecting the commission of statutory misdemeanours and offences. By a curious anomaly an order issued by a magistrate under s. 1 of the Musical (Summary Proceedings) Copyright Act, 1902, confers, upon the constable executing it, no right to institute the enjoined search in a private house (*a*).

Constable protected by warrant.

At one time persons executing the warrants of justices were exposed to a double danger. If the warrant was issued without jurisdiction it was a nullity, and they could not plead its protection for any interference with the person or property of others; if it was issued with jurisdiction they were still liable for anything they did not covered by its authority. They were thus endangered not only by their own mistakes but by the mistakes of the justices. It is however provided by 24 Geo. II. c. 44, s. 6, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand and seal of any justice of the peace until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand." If the demand is duly complied with, then on the production of the warrant at the trial the defendant is entitled to a verdict notwithstanding any defect of jurisdiction in the justice (*b*).

The object of this statute is that a constable who has obeyed a warrant may be protected, and yet a party who has suffered a wrong may be under no difficulty as to his remedy. On inspection

(*a*) *Francis and Others, In re*, (1903) 88 L. T. 806.

(*b*) Certain portions of the section applying to justices are repealed by 11 & 12 Vict. c. 44, s. 17. As to what is a proper demand, see *Clark* v. *Woods*, (1848) 2 Ex. 395; *Jory* v. *Orchard*, (1799) 2 B. & P. 39. Compliance with the demand may be waived: *Atkins* v. *Kilby*, (1840) 11 A. & E. 777. It is not bad because it demands a perusal within less than six days: *Collins* v. *Rose*, (1839) 5 M. & W. 194. It must be made on the person charged with the warrant, not on any one acting in aid: *Clarke* v. *Darey*, (1820) 4 Moore, 465. The action may be begun immediately upon the expiry of the six days, but if delayed the constable may protect himself by compliance any time before writ issued: *Jones* v. *Vaughan*, (1804) 5 East, 445.

of the warrant he can see whether it directed the act of which he complains. If it did, he has no remedy against the constable, but may possibly sue the justice; if it did not, then the constable is liable. The section does not apply where the warrant is within the jurisdiction of the justice, and the cause of action is against the constable in respect of something which the warrant did not authorise (*a*).

Wrongful execution of warrant.

A constable, therefore, may be liable to an action of trespass or other tort though he is acting as he believes under the authority of a warrant.

By party to whom warrant not addressed.

(a) He may not be the party to whom the warrant is addressed (*b*). In *Freegard* v. *Barnes* (*c*) a search warrant was directed to the constable at Dauntsey. There was a parish constable at that place. The warrant, however, was executed by a member of the county police belonging to the district. It was held that he was guilty of a trespass.

Against wrong person or wrong goods.

(b) He may have executed it on the wrong person or the wrong property. However honestly mistaken, a constable cannot be justified if he arrest A. in virtue of a warrant directed against B., or take C.'s goods under a distress against D. In *Hoye* v. *Bush* (*d*) the facts were as follows. Richard Hoye was suspected of stealing a mare. A warrant was issued for his apprehension under the name of John Hoye, which was his father's name. The son had never been known as John. He was arrested by the defendant under the warrant, and subsequently brought an action of false imprisonment, in which he recovered. It was held that Richard could not be arrested under a warrant against John, and that it was immaterial that Richard was in truth the party intended (*e*). If a search warrant specifically mention certain chattels, those only must be taken (*f*). But where a search warrant, reciting that there was just cause to suspect that certain

(*a*) *Hoye* v. *Bush*, (1840) 1 M. & G. 775. See also *Wilson* v. *Bennett*, (1904) 6 F. 269, Ct. of Sess.

(*b*) *Symonds* v. *Kurtz*, (1889) 53 J. P. 727.

(*c*) (1852) 7 Ex. 827; followed *Reg.* v. *Saunders*, (1867) L. R. 1 C. C. R. 75.

(*d*) (1840) 1 M. & G. 775. See *Kay* v. *Grover*, (1831) 7 Bing. 312.

(*e*) Warrants issued by magistrates under 11 & 12 Vict. c. 42, s. 10, and 11 & 12 Vict. c. 43, s. 3, may "name or otherwise describe" the person against whom they are directed.

(*f*) *Crozier* v. *Cundey*, (1827) 6 B. & C. 232. Possibly things may be taken which are likely to be of use in substantiating the charge in respect of the goods mentioned in the warrant: *ibid.*

stolen sugars were concealed on the plaintiff's premises, directed the defendants to search on the premises for the said stolen goods, and, if found, to secure them, and the defendants thereupon seized certain sugar which was not the stolen sugar, though resembling it, the Court held that though possibly the warrant might be improper, owing to its generality, the defendant had executed it duly, because they had executed it in the only way in which it was capable of execution (*a*).

Outside jurisdiction.

(c) The constable may have executed the warrant outside of the limits within which it gives him authority, whether those limits be the jurisdiction of the magistrate or his own constablewick (*b*).

Wrong time.

(d) He may have executed it at the wrong time. As a rule warrants may be executed at any hour of the day; but on search warrants it is the usual and proper course to direct that the search shall only take place in the daytime (*c*). By 29 Car. II. c. 7, s. 6, all process executed on Sunday shall be void, except in case of treason, felony, and breaches of the peace. Under the last part of the exception are included not merely actual affrays, but all misdemeanours, for these are constructively offences against the peace of our Lord the King (*d*). A warrant to bring up a party to find sureties of the peace may be executed on a Sunday (*e*). But where it is sought to enforce obedience to an order or to compel the payment of money, even though that money be a penalty, then Sunday is not a lawful day (*f*).

Without notice of charge.

(e) He may have failed to give due notice of the grounds on which he claims to effect the apprehension (*g*).

Without having warrant in possession.

(f) He may not have had the warrant with him at the time of the alleged wrongful act. He who seeks to execute a warrant ought to be in a position to produce it as his authority, if demanded (*h*).

(*a*) *Price* v. *Messenger*, (1800) 2 B. & P. 158.

(*b*) *Milton* v. *Green*, (1804) 5 East, 233; *Gladwell* v. *Blake*, (1834) 1 C. M. & R. 636.

(*c*) Hale, Vol. 2, p. 113.

(*d*) *Rawlins* v. *Ellis*, (1846) 16 M. & W. 172.

(*e*) *Johnson* v. *Coltson*, (1679) T. Raym. 250.

(*f*) *Rex* v. *Myers*, (1786) 1 T. R. 265; *Eggington's Case*, (1853) 2 E. & B. 717. It is stated in Oke's Magisterial Synopsis, 12th ed. p. 863, that a search warrant may be executed on a Sunday, but no authority is given.

(*g*) *Mackalley's Case*, (1611) 9 Rep. p. 68; *Rex* v. *Howarth*, (1828) 1 Moo. C. C. 207.

(*h*) *Galliard* v. *Laxton*, (1862) 2

(g) He may have executed the warrant improperly by breaking open an outer door, and if so, not merely the breaking of the door, but the subsequent arrest, will be an unlawful act (*a*). The general rule is, that the outer door of the party's own house may be forced if necessary to execute any process to which the Crown is a party, and that the house of a third party may be forced if it is used as a means of evading any lawful execution. It has also been said that an outer door may be broken open to arrest an absconding debtor (*b*). The substantial distinction is between civil and criminal process. Under the latter head would appear to fall all warrants of apprehension on a criminal charge (*c*), and all warrants of commitment on conviction, even although the alternative of a fine be given. But if a penalty simply is imposed in the first instance, and imprisonment subsequently ordered, not as an alternative, but in order to enforce payment in default of sufficient distress, this, it would appear, is a process civil in its nature, and therefore enforcible under the limitations applicable to civil process. It would seem to follow that on a distraint for a fine or penalty the outer door cannot be broken (*d*). A search warrant at common law can in no case be executed except *foribus apertis* (*e*), but in some cases statutes give power of forcible entry. Forcible entry.

(h) He may at the time of the arrest or seizure have been guilty of an assault (*f*) or subsequently thereto may have improperly confined his prisoner or otherwise acted in an unauthorised manner, but he will not, it is apprehended, in such a case be a trespasser *ab initio* (*g*).

(i) In the execution of a distress warrant the statute is no protection against an action for excessive distress.

A constable, though he makes a mistake in the execution of a warrant which will deprive him of the right to justify under it,

B. & S. 363; *Codd* v. *Cabe*, (1876) 1 Ex. D. 352.

(*a*) See above, p. 750.

(*b*) *Hendry, Ex parte, Von Weissenfeld, In re*, (1892) 36 S. J. 276.

(*c*) Dalton's Justice of the Peace, 2nd ed. p. 404; Foster's C. C. 320; Hale, P. C., Vol. 1, p. 580; Hawkins, P. C., Vol. 2, p. 136.

(*d*) *Rex* v. *Myers*, (1786) 1 T. R. 255; see, however, Hawkins, P. C., Vol. 2, p. 136.

(*e*) Hale, Vol. 2, pp. 116–7.

(*f*) *Wilson* v. *Bennett*, (1904) 6 F. 269, Ct. of Sess.

(*g*) See *Smith* v. *Eggington*, (1837) 7 A. & E. 167.

may nevertheless be protected by his general authority as an officer of the peace. Thus, if in his own constablewick he arrest under a warrant for felony the wrong man, or arrest without having the warrant in his possession, he will still be protected if he reasonably suspected the party whom he actually took into custody to be guilty of the crime (*a*). Action will lie against a constable for delivering up, after demand by the true owner, to a person accused of felony and subsequently acquitted, the goods which were the subject-matter of the charge. Nor will a plea that the constable acted by the orders of a superior officer exonerate him from liability (*b*).

(*a*) See *Hoye* v. *Bush*, (1840) 1 M. & G. 775.

(*b*) *Winter* v. *Bancks*, (1901) 84 L. T. 504.

CHAPTER XXIII.

REMEDY BY INJUNCTION.

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In addition to the remedy by action for damages in respect of torts which have actually been committed, there is, in certain cases, an ancillary remedy by way of injunction to prevent the commission of torts which are threatened or anticipated, or in cases of continuing injuries to restrain their continuance.

Principle on which injunction granted.

The principle upon which such injunction is granted is that the injury, if suffered to be inflicted, would be of such a character that the plaintiff could not practically be compensated in damages. In some cases the injunction takes a mandatory form, where the defendant has created a permanent source of injury, such as the erection of a building to the nuisance of the plaintiff's lights or to the obstruction of his right of way, and orders him to restore the plaintiff to his right by removing the offending building or other source of damage (*a*).

Torts of all kinds may be restrained by injunction.

By s. 79 of the Common Law Procedure Act, 1854, it was provided that "in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of contract or other injury"; and by s. 82 the plaintiff was empowered to apply for such writ at any stage of the cause (*b*). Previously to that Act there was no power in any court to restrain the publication of a libel (at all events until after the matter had been found to be a libel by the verdict of a jury (*c*))—not in the Court of Chancery, for the

(*a*) For converse of this rule, see *Brocklebank* v. *Thompson*, (1903) 2 Ch. 344.

(*b*) These two sections are now repealed by 46 & 47 Vict. c. 49.

(*c*) Whether the Court of Chancery had power to restrain publication of a libel after verdict found is doubtful. Probably it had; see *per* Baggallay, L.J., *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, (1882) 20 Ch. D. p. 510, and *per* Lindley, L.J., *Saxby* v. *Easter-*

question of libel or no libel was one which they could not decide, nor in the Courts of Common Law, for they had no power to grant injunctions at all. By that Act, however, power so to do was given to the Common Law Courts, for it applied to torts of all kinds without any exception as to defamation, which term includes slander of title (*a*). Then by s. 16 of the Judicature Act, 1873, there was transferred to the High Court the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by any of the superior courts, including the jurisdiction above mentioned under the Common Law Procedure Act. And further by s. 25, sub-s. 8, of the same Act "an injunction may be granted . . . by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before, or at, or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does, or does not, claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable."

Interlocutory injunction may be granted where "just or convenient."

The words "just" and convenient" in the section mean practically the same thing. That would not be convenient which was unjust, and in ascertaining what is just regard must be had to what is convenient (*b*).

The effect of these provisions is that all branches of the High

brook, (1878) 3 C. P. D. p. 343; though see *contra*, *per* Lord Eldon, *Gee* v. *Pritchard*, (1818) 2 Swanst. p. 413, and *per* Lord Campbell, *Emperor of Austria* v. *Day*, (1861) 3 De G. F. & J. p. 238. But even if it had such power there does not appear to be any reported case of its exercise. In *Prudential Assurance Co.* v. *Knott*, (1875) L. R. 10 Ch. 142, the Court were apparently referring only to applications before verdict found.

(*a*) *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, (1903) 20 T. L. R. 88, reversed on evidence, (1904) 20 T. L. R. 579.

(*b*) *Per* Jessel, M.R., *Beddow* v. *Beddow*, (1878) 9 Ch. D. p. 93. But see below, p. 791, as to the rule of practice which has been established by the Court limiting the conditions under which it is just and convenient to grant interlocutory injunctions to restrain libels.

Court have now power before, at, and after the trial of the action, to grant injunctions to restrain the commission of torts of all descriptions, including libels (*a*). It would seem that the Court has jurisdiction even to restrain the commission of assaults. But whether it would ever exercise that power is another question. The proper remedy of a person who is under apprehension of an assault is to apply to justices to have the defendant bound over to keep the peace.

Discretion of Court to grant injunction.

The granting of an injunction is in the discretion of the Court; but the discretion is one which, in many cases, the Court will practically exercise only in one way. The exercise of the Court's discretion will depend upon the following considerations.

In the first place the Court must be satisfied that the injury which is apprehended will be either continuous or frequently repeated, or very serious (*b*). And in such cases an injunction to restrain the recurrence of a nuisance or other damage will be granted after the nuisance is abated (*c*). If the Court is satisfied that the damage will be continuous or of frequent recurrence, it is not necessary that it should be of a highly serious nature; it will be enough that the injury will be of such a degree as would suffice to support an action for damages (*d*). An injunction will be granted to restrain a bare trespass, such as the wrongful use of a way, if the Court is satisfied that the trespass, unless restrained, will be frequently repeated (*e*). The ground upon which relief by injunction is granted in such cases is to prevent the plaintiff being put to the trouble and inconvenience of having to bring successive actions from time to time to recover a series of small damages (*f*).

Where damage continuous or of frequent recurrence.

It has, however, been held in the recent case of *Behrens* v.

(*a*) There is in this respect no distinction between libels affecting trade or property and those affecting personal reputation: *Bonnard* v. *Perryman*, (1891) 2 Ch. 269; *Monson* v. *Tussauds, Limited*, (1894) 1 Q. B. 671.

(*b*) *Per* Page-Wood, L.J., *Attorney-General* v. *Cambridge Consumers' Gas Co.*, (1868) L. R. 4 Ch. p. 81.

(*c*) *Chester, Dean of*, v. *Smelting Corporation, Limited*, (1901) 85 L. T. 67.

(*d*) *Clowes* v. *Staffordshire Potteries Waterworks Co.*, (1872) L. R. 8 Ch. 125; *Rochdale Canal Co.* v. *King*, (1851) 2 Sim. N. S. 78; *Soltau* v. *De Held*, (1851) 2 Sim. N. S. 133; and see *Cowper* v. *Laidler*, (1903) 2 Ch. 337.

(*e*) *Coulson* v. *White*, (1743) 3 Atk. 21.

(*f*) *Per* Page-Wood, L.J., (1868) L. R. 4 Ch. p. 81; *per* Mellish, L.J., (1872) L. R. 8 Ch. p. 142; *per* James, L.J., *ibid.* p. 143.

Richards (*a*), that the Court will not restrain by injunction a user by the public of field paths traversing private property when such user inflicts no appreciable injury on the personal enjoyment of the owner of the land.

A temporary nuisance which is not serious is not restrainable, even at the hearing (*b*), and still less will an interlocutory injunction be granted to restrain it (*c*). Where, however, the nuisance, though of a temporary character, is such as materially to interfere with the comfort of neighbouring owners and occupiers it will be restrained by injunction (*d*).

But an injunction will not, as a rule, be granted to restrain a nuisance which is intended to be repeated only at long intervals, and which on the occasion of each repetition will only be of short duration, as in the case of a gas company proposing periodically to take up the roadway for the purpose of repairing their gas-pipes, which they have laid in the road without statutory powers (*e*). Nor can a trespass which is only temporary and contingent be the subject of an injunction (*f*). On the same principle, a mandatory injunction to remove a building which obstructs the plaintiff's ancient lights will not be granted where the plaintiff, being only a tenant from year to year, is under notice to quit (*g*).

It was formerly thought that the cases of patents, trade-marks, and copyright stood upon a peculiar footing in this respect, that from a single instance of infringement the Court was bound to infer the probability of repetition, however improbable such repetition might be in point of fact. It was accordingly held that if a person infringed the patent, trade-mark, or copyright of another in ignorance of that other's right (*h*), the Court was

(*a*) (1905) 74 L. J. Ch. 615.

(*b*) *Per* Turner, L.J., *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, (1865) L. R. 1 Ch. p. 355; *Swaine* v. *Great Northern R. Co.*, (1864) 4 De J. & S. 211.

(*c*) *Cleeve* v. *Mahany*, (1861) 9 W. R. 882.

(*d*) *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707; *Knight* v. *Isle of Wight Electric Light & Power Co.*, (1904) 73 L. J. Ch. 299.

(*e*) *Attorney-General* v. *Sheffield Gas Consumers' Co.*, (1852-3) 3 De G. M. & G. 304. See also *Chapman, Morsons & Co.* v. *Guardians of Auckland Union*, (1889) 23 Q. B. D. 294.

(*f*) *Coulson* v. *White*, (1743) 3 Atk. 21.

(*g*) *Jacomb* v. *Knight*, (1863) 32 L. J. Ch. 601.

(*h*) *Geary* v. *Norton*, (1846) 1 De G. & Sm. 9; *Millington* v. *Fox*, (1837) 3 M. & C. 338; *Cooper* v. *Whittingham*, (1880) 15 Ch. D. 501.

bound to grant an injunction; and in some cases judges went the length of holding that they had not even discretion to refuse the plaintiff his costs (*a*), even though the defendant upon complaint being made undertook to commit no further infringement (*b*). It is apprehended, however, that this extreme view can scarcely be regarded as accurately representing the law with regard to this particular description of property in the present day, in spite of the fact that the Trade Marks Act, 1905 (*c*), creates a vested and exclusive interest and proprietorship in the registered owner of a trade mark analogous in character to that possessed by an absolute owner in any other description of personal property.

A defendant who has done a wrongful act cannot protect himself from an injunction by merely saying that he does not intend to do it again, the Court will now, in each case, grant or refuse the injunction according as they do or do not draw the inference that the defendant in fact intends to repeat the act complained of (*d*). And if a person innocently infringes a trade mark, the Court, even though they grant an injunction, will not necessarily order him to pay the costs of the action (*e*).

Where apprehended injury serious.

Where the damage is not likely to be continuous or frequent, it must be serious (*f*), as where there is apprehension of the kind of damage which would be caused by an explosion. The Court will restrain the storing of any substance which is likely to be a source of serious danger to the adjoining property, such as gunpowder (*g*), or damp jute, which is liable to spontaneous ignition (*h*); and a similar rule applies in the case of overhanging branches of trees injuriously affecting the land of an adjoining proprietor (*i*).

Again, where there is a conflict of statutory powers and the exercise by one corporation or individual of such power, in a

(*a*) *Cooper* v. *Whittingham*, *supra*, p. 786.

(*b*) *Geary* v. *Norton*, *supra*; *Upmann* v. *Forrester*, (1883) 24 Ch. D. 231.

(*c*) 5 Ed. VII. c. 15, ss. 38, 39.

(*d*) *Proctor* v. *Bayley*, (1889) 42 Ch. D. 390.

(*e*) *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; *Walter* v. *Steinkopff*, (1892) 3 Ch. 489.

(*f*) *Cooke* v. *Forbes*, (1867) L. R. 5 Eq. p. 172.

(*g*) *Crowder* v. *Tinkler*, (1816) 19 Ves. 617.

(*h*) *Hepburn* v. *Lordan*, (1865) 2 H. & M. 345.

(*i*) *Smith* v. *Giddy*, (1904) 2 K. B. 448.

particular manner, tends seriously to menace the works or property of another corporation or individual possessed of similar powers, the Court will grant an injunction restraining the performance of any overt act by the one corporation or person that is likely to imperil the works or property of the other (*a*).

Loss to defendant taken into consideration.

Secondly, the Court will consider what relation the damage which would be caused to the plaintiff by refusing the injunction and to the defendant by granting it bear to one another. Thus, if the defendant has erected a building to the obstruction of the plaintiff's ancient lights or right of way, the Court will take into consideration "not only the injury to the plaintiff, but also the amount which has been laid out by the defendant" (*b*). So, too, where the defendant has at great expense established manufacturing works which cause a nuisance to the plaintiff (*c*), or proposes to work his mines in a way which will destroy the plaintiff's houses on the surface (*d*), the Court will weigh the damage which the defendant would suffer from the stopping of the works or mining operations against the damage which the plaintiff would suffer from their continuance, and decide on the balance of convenience. To this rule, however, there is an exception where the expenditure, which the granting of the injunction would cause to be thrown away, has been wilfully incurred by the defendant after notice of the plaintiff's right, and in defiance of it (*e*). In such case the Court will not take into consideration the fact that the damage inflicted on the defendant by granting the injunction will be out of all proportion to the benefit secured to the plaintiff. If a person chooses to erect a palace in such a position as to obstruct the access of light to the window of a cottage, in defiance of notice that the window is ancient, the Court will not compel the plaintiff to accept damages in lieu of an injunction, but will order the offending building to be pulled

Exception.

(*a*) *East London R. Co.* v. *The Conservators of the River Thames*, (1904) 68 J. P. 302.

(*b*) *Per* Jessel, M.R., *Smith* v. *Smith*, (1875) L. R. 20 Eq. p. 505. See, too, *Aynsley* v. *Glover*, (1874) L. R. 18 Eq. p. 555; *Kelk* v. *Pearson*, (1871) L. R. 6 Ch. p. 812.

(*c*) *Wood* v. *Sutcliffe*, (1851) 2 Sim. N. S. 163.

(*d*) *Hilton* v. *Earl Granville*, (1841) Cr. & Ph. 283.

(*e*) *Daniel* v. *Ferguson*, (1891) 2 Ch. 27; *Woodhouse* v. *Newry Navigation Co.*, (1898) 1 Ir. R. 161, C. A.; see also *Home & Colonial Stores* v. *Colls*, (1902) 1 Ch. 302.

down if the plaintiff so demands (*a*), for to act otherwise would be "to compel a man who is wronged to sell his property to the person who has wronged him" (*b*).

The effect of a recent decision (*c*) on the question of obstruction to ancient lights, in cities and other closely inhabited districts, is, however, to show that it is not sufficient to constitute an illegal obstruction, or to justify the issue of a mandatory injunction, for the plaintiff to prove that, owing to the action of the defendant, he has, in fact, less light than he had before the erection of the obnoxious structure, nor that his warehouse, office, shop, or other business premises would not subsequently to such erection be used for all the purposes to which it could formerly be applied. In order to give a valid right of action it is essential for the plaintiff to show that the erection complained of actually causes such a substantial privation of light as to render the occupation of the house uncomfortable (*d*), or that it prevents the plaintiff from carrying on his accustomed business as beneficially and profitably as he could formerly have done (*e*).

Interests of third persons considered.

Thirdly, the interests of third persons must be in some cases considered (*f*), as, for instance, where the granting of an injunction would cause the stoppage of a trade and the throwing out of work of a large number of workpeople. But where the offence alleged is the violation of a statutory public right, the Court will restrain such violation without proof of actual injury, although the effect of the injunction will be the retardation of passenger transit, and incidentally of the mails, over the main line of a railway system (*g*).

Acquiescence.

Fourthly, the Court will consider whether the plaintiff by his acquiescence in the defendant's conduct has caused him to alter his position. If the plaintiff sees the defendant laying out

(*a*) *Krehl* v. *Burrell*, (1878–9) 7 Ch. D. 551; 11 Ch. D. 146.

(*b*) *Per* James, L.J., 11 Ch. D. p. 148.

(*c*) *Colls* v. *Home & Colonial Stores*, (1904) 20 T. L. R. 475, H. L. And see *Ambler & Fawcett* v. *Gordon*, (1905) 1 K. B. 417.

(*d*) *Kine* v. *Jolly*, (1905) 1 Ch. 480, C. A.

(*e*) *Higgins* v. *Betts*, (1905) 2 Ch. 210.

(*f*) *Per* Kindersley, V.-C., *Wood* v. *Sutcliffe*, (1851) 2 Sim. N. S. p. 165.

(*g*) *Att.-Gen.* v. *London & North-Western R. Co.*, (1900) 1 Q. B. 78, C. A. See also *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. 34 (a case of infringement on building line). Apparently in such cases the Attorney-General must be a party to the cause: *Deronport Corporation* v. *Tozer*, (1903) 1 Ch. 759, C. A.

money in buildings or manufacturing works which when completed will be productive of injury to him, he ought to complain without delay (*a*). The Court "will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement" (*b*). If the plaintiff delays to complain until after the expenditure has been incurred and the defendant's position thereby altered, he will disentitle himself to an injunction (*c*). The fact that a building which obstructs the plaintiff's lights has been suffered to be erected without complaint is in general a bar to a mandatory injunction to remove it (*d*). But, as there can be no acquiescence without knowledge, mere lapse of time between the defendant's commencing to incur the expenditure and the application for the injunction will be immaterial, if the plaintiff did not become aware of the expenditure until after it was completed. Where a plaintiff does not acquire knowledge of an interference with his right of light, or knowledge of the extent of such interference, until after the obstruction has been erected, mere subsequent delay on his part, not causing the defendant in any way to alter his position, will not bar his right to a mandatory injunction (*e*). Mere delay not causing the defendant to alter his position, even though the plaintiff may have been perfectly aware of the infringement of his rights, is no ground for refusing an injunction, unless it is so long as to bring the case within the Statute of Limitations (*f*). Acquiescence seems to be regarded as the subject of degree, and it is said that a less degree of acquiescence will justify the refusal of an interlocutory injunction than will justify the refusal of an injunction at or after the hearing (*g*). In all cases, however, where by the terms of an original contract the damages for its

Delay.

(*a*) *Duke of Leeds* v. *Earl of Amherst*, (1846) 2 Ph. 117.

(*b*) *Per* Lord Eldon, *Dann* v. *Spurrier*, (1802) 7 Ves. p. 235. See *Monson* v. *Tussauds, Limited*, (1894) 1 Q. B. 671.

(*c*) *Rochdale Canal Co.* v. *King*, (1851) 2 Sim. N. S. 78; *Wood* v. *Sutcliffe*, (1851) 2 Sim. N. S. 163.

(*d*) See *per* Thesiger, L.J., *Gaskin* v. *Balls*, (1879) 13 Ch. D. p. 329.

(*e*) *Gale* v. *Abbott*, (1862) 8 Jur. N. S. 987; *Higgins* v. *Betts*, (1905) 2 Ch. 210.

(*f*) *Fullwood* v. *Fullwood*, (1878) 9 Ch. D. 176.

(*g*) *Per* Turner, L.J., *Johnson* v. *Wyatt*, (1863) 2 De G. J. & S. p. 25.

breach are ascertained and liquidated, the aggrieved party is not entitled to such ascertained damages and an injunction as well, but must make his election between the two (*a*).

And where a plaintiff asks for general damages as ancillary to the injunction he is not entitled to substantial damages, although something should be awarded him as a *solatium* for the wrong he has suffered (*b*).

In the case of an application for an injunction coupled with a claim for unliquidated damages it has been decided by the House of Lords (*c*), that the proper tribunal for ascertaining the facts and assessing the damages is a jury.

Interlocutory injunctions.

As already stated (*d*), injunctions of all kinds, including mandatory injunctions (*e*), may be granted on an interlocutory application. But to support such an application, a very strong *primâ facie* case must be made out. Particularly is this so in the case of an application to restrain the publication of a libel, in dealing with which the Court have necessarily to usurp temporarily the province of the jury, and determine by anticipation the question of libel or no libel. In *Coulson* v. *Coulson* (*f*), Lord Esher laid down the following rules as to the exercise of the jurisdiction in cases of libel: "It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion there was malice on the part of the defendant. It follows, from those three rules, that the Court could only on the rarest occasions exercise the jurisdiction." The first of those three rules was subsequently expressly approved by the full Court of Appeal in *Bonnard* v. *Perryman* (*g*), which case has since been regarded as laying down an absolute rule of practice limiting the discretion of the Court as to granting interlocutory injunctions pending

(*a*) *General Accident Insurance Corporation* v. *Noel*, (1902) 1 K. B. 377.

(*b*) *Lipman* v. *Pulman & Sons, Ltd.*, (1904) 91 L. T. 132.

(*c*) *Lord De Freyne* v. *Johnston*, (1904) 20 T. L. R. 454, H. L.; see also S. C. *sub nom. De Freyne* v. *Fitzgibbon and Others*, (1904) 1 Ch. 400, Ir.

(*d*) See above, p. 784.

(*e*) *Hervey* v. *Smith*, (1855) 1 K. & J. 389; *Hermann Loog* v. *Bean*, (1884) 26 Ch. D. 306.

(*f*) (1887) 3 Times L. R. 846.

(*g*) (1891) 2 Ch. 269. The two other

the trial in actions of libel (*a*). In *Collard* v. *Marshall* (*b*), a case of a trade libel, the judge, being of opinion that the case satisfied the conditions of the above rule, granted an injunction. And in a modern case an interim injunction was granted restraining the publication of a false statement by the defendant that the plaintiffs (a banking company) were in liquidation (*c*). But even if a case does satisfy the conditions of the above rule, the Court are not bound to grant the injunction, they have still a discretion to refuse it if they think it unnecessary (*d*).

Terms imposed by Court when granting interim injunction.

Ordinarily when an interlocutory injunction is granted the Court makes it a condition precedent to such grant that the plaintiff shall enter into an undertaking as to damages.

But in the case of a voluntary undertaking by a defendant, in lieu of an interim injunction, there is no practice or rule of Court under which a cross undertaking in damages by the plaintiff is to be implied (*e*).

Action *quia timet*.

As a general rule, it is premature for the plaintiff to come to the Court for an injunction before a complete cause of action has accrued, for instance, in a case where damage is of the gist of the action, before damage has actually happened; and particularly is this so in the case of nuisance arising from the carrying on of a noxious trade. Where, however, there is a practical certainty that substantial damage is imminent, the plaintiff may apply for an injunction at once without waiting until it has actually happened (*f*). Lord Hardwicke is reported (*g*) to have said: "Bills to restrain nuisances must extend to such only as are nuisances at law, and the fears of mankind, though they may be reasonable ones, will not create a nuisance." That, however, is not now to be regarded as law (*h*). If the danger be substantial

rules laid down by Lord Esher did not there come in question. But their correctness has never been disputed.

(*a*) *Per* Lopes and Davey, L.JJ., *Monson* v. *Tussauds, Limited*, (1894) 1 Q. B. pp. 694, 697. Though see *per* Lord Halsbury, *contra*, *ibid.* p. 689.

(*b*) (1892) 1 Ch. 571.

(*c*) *The London & Northern Bank, Ltd.* v. *George Newnes, Ltd.*, (1899) 16 T. L. R. 76.

(*d*) *Salomons* v. *Knight*, (1891) 2 Ch. 294.

(*e*) *Howard* v. *The Press Printers, Ltd.*, (1905) 74 L. J. Ch. 100, C. A.

(*f*) *Earl of Ripon* v. *Hobart*, (1834) 3 M. & K. 169; *Fletcher* v. *Bealey*, (1884–5) 28 Ch. D. 688; and see *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, (1903) 52 W. R. 254.

(*g*) *Anon.*, (1752) 3 Atk. p. 751.

(*h*) *Per* Lord Halsbury, *Cowper Essex* v. *Local Board for Acton*, (1889) 14 App. Cas. p. 160.

and imminent an injunction will be allowed. "Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage Nay, it will go further, and according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief should it be done, would be vast and overwhelming" (*a*). And it is apprehended that this jurisdiction applies as well to libels as to other wrongs, that is to say, that the Court may restrain the threatened publication of a libel which has never yet been published (*b*).

In *White* v. *Mellin* (*c*), where a trader claimed an injunction to restrain a rival trader from publishing false statements, disparaging the plaintiff's goods, and failed to prove any present damage, or certainty of future damage happening, the injunction was refused. There are, indeed, certain passages in the judgments in that case which at first sight seem to suggest that proof of actual damage already suffered is essential to a claim for an injunction. Thus Lord Herschell says: "To call for the exercise of that power" (injunction), "it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a cause of action, that is to say, if special damage was necessary to the maintenance, and that special damage was not shown, a tort in the eye of the law would not be disclosed, the case would not be within those provisions" (of the C. L. P. Act, 1854), "and no injunction would be granted" (*d*). And Lord Watson says: "Damages and injunctions are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies,

(*a*) *Per* Lord Brougham, *Earl of Ripon* v. *Hobart*, (1834) 3 M. & K. p. 176.

(*b*) But if so the jurisdiction must be derived solely from s. 25, sub-s. (8), of the Judicature Act, and not from s. 16. For s. 79 of the Common Law Procedure Act 1854, the jurisdiction under which is transferred by the latter section to the High Court, only allowed injunctions against "the repetition or continuance" of wrongs which had already been committed.

(*c*) (1895) A. C. 154.

(*d*) *Ibid.* p. 163.

are equally necessary in the case of the second" (*a*). But those passages must not be understood as throwing any doubt upon the possibility of bringing an action for an injunction *quia timet* before any damage has actually happened (*b*). For Lord Watson went on to say that it is incumbent upon a plaintiff who asks for an injunction "to satisfy the Court that such damage will necessarily be occasioned to him in the future." The lords were satisfied that in that case it was highly improbable that the conduct sought to be restrained would ever result in any damage to the plaintiff.

Lord Cairns' Act.

By 21 & 22 Vict. c. 27, s. 2, commonly called Lord Cairns' Act, the Court of Chancery was empowered, in all cases in which it might grant an injunction against a wrongful act, to award damages either in addition to or in substitution for such injunction. But that jurisdiction will only be exercised under very exceptional circumstances (*c*). If damages are given in substitution for an injunction, they ought to extend to all that which would have been covered by the injunction (*d*), and as the injunction would be perpetual the damages ought to be awarded on the basis of the defendant purchasing the right to continue the wrongful act in perpetuity (*e*). By the Statute Law Revision Act, 1883 (*f*), s. 8, Lord Cairns' Act was amongst other statutes in terms repealed, but by s. 5 of the same Act the repeal is not to affect "any jurisdiction . . . established by any enactment repealed by this Act." Whether the Court has jurisdiction to award damages in lieu of an injunction where the injury is not yet committed, but only threatened, is doubtful (*g*). But apparently the inclination of the Court is in the direction of holding that it has not.

County court may grant injunctions.

By virtue of s. 89 of the Judicature Act, 1873, a county court has now, in actions within its jurisdiction, power to grant injunctions and enforce obedience thereto by committal in the same manner as the High Court has power (*h*).

(*a*) *White* v. *Mellin*, (1895) A. C. 154 at p. 167.

(*b*) And see *Cowper* v. *Laidler*, (1903) 2 Ch. 337.

(*c*) *Per* Lord Halsbury, *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287.

(*d*) *Per* Fry, J., *Fritz* v. *Hobson*, (1880) 14 Ch. D. p. 548.

(*e*) See *supra*, pp. 170 *sqq.*

(*f*) 46 & 47 Vict. c. 49.

(*g*) *Per Cur.*, *Martin* v. *Price*, (1894) 1 Ch. p. 284.

(*h*) *Martin* v. *Bannister*, (1879) 4 Q. B. D. 491.

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